No. 16-476 **Vide 16-477**	
Title:	**Philip D. Murphy, Governor of New Jersey, et al., Petitioners** **v.** **National Collegiate Athletic Association, et al.**
Docketed:	October 12, 2016
Lower Ct:	United States Court of Appeals for the Third Circuit
Case Numbers:	(14-4546, 14-4568, 14-4569)
Decision Date:	August 9, 2016
Questions Presented	

DATE	**PROCEEDINGS AND ORDERS**
Oct 07 2016	Petition for a writ of certiorari filed. (Response due November 14, 2016)
Oct 21 2016	Order extending time to file response to petition to and including December 14, 2016.
Nov 04 2016	Brief amicus curiae of Professor Ryan M. Rodenberg filed. VIDED.
Nov 14 2016	Brief amicus curiae of The American Gaming Association filed. VIDED.
Nov 14 2016	Brief amici curiae of West Virginia, et al. filed.
Nov 14 2016	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Dec 14 2016	Brief of respondents National Collegiate Athletic Association, et al. in opposition filed. VIDED.
Dec 27 2016	Reply of petitioners Christopher J. Christie, Governor of New Jersey, et al. filed.
Dec 28 2016	DISTRIBUTED for Conference of January 13, 2017.
Jan 17 2017	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 23 2017	Brief amicus curiae of United States filed. VIDED.

Jun 06 2017	Supplemental brief of petitioners Christopher J. Christie, Governor of New Jersey, et al. filed. (Distributed)
Jun 06 2017	DISTRIBUTED for Conference of June 22, 2017.
Jun 26 2017	DISTRIBUTED for Conference of June 26, 2017.
Jun 27 2017	Petition GRANTED. The petition for a writ of certiorari in 16-477 is granted. The cases are consolidated and a total of one hour is allotted for oral argument. VIDED.
Jul 07 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Petitioner.
Jul 19 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents. VIDED
Jul 21 2017	Brief amicus curiae of Professor Ryan M. Rodenberg in support of neither party filed. VIDED.
Jul 31 2017	The time to file the joint appendix and petitioners' briefs on the merits is extended to and including August 29, 2017. VIDED.
Jul 31 2017	The time to file respondents' brief on the merits is extended to and including October 16, 2017. VIDED.
Aug 29 2017	Joint appendix filed. VIDED. (Statement of costs filed)
Aug 29 2017	Brief of petitioners Christopher J. Christie, Governor of New Jersey, et al. filed.
Aug 29 2017	Brief amici curiae of Pacific Legal Foundation, et al. filed. VIDED.
Aug 30 2017	Brief amicus curiae of Researcher John T. Holden filed. VIDED.
Sep 05 2017	Brief amicus curiae of The American Gaming Association filed. VIDED.
Sep 05 2017	Brief amici curiae of National Governors Association, et al. filed.
Sep 05 2017	Brief amici curiae of West Virgina, 17 other States and the Governors of Kentucky, Maryland and North Dakota filed.

Sep 05 2017	Brief amicus curiae of New Sports Economy Institute in support of neither party filed. VIDED.
Sep 05 2017	Brief amici curiae of Constitutional Law Scholars filed.
Sep 05 2017	Brief amici curiae of European Sports Security Association, et al. filed. VIDED.
Sep 05 2017	Brief amicus curiae of Congressman Frank J. Pallone, Jr. filed. VIDED
Oct 06 2017	SET FOR ARGUMENT ON Monday, December 4, 2017. VIDED.
Oct 16 2017	Brief of respondents National Collegiate Athletic Association, et al. filed. VIDED.
Oct 18 2017	Motion of Professor Ryan M. Rodenberg for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Oct 18 2017	Record requested from the U.S.C.A. 3rd Circuit.
Oct 19 2017	CIRCULATED
Oct 23 2017	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed. VIDED. (Distributed)
Oct 23 2017	Brief amicus curiae of United States filed. VIDED. (Distributed)
Oct 23 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Oct 26 2017	Brief amici curiae of Stop Predatory Gambling, et al. filed. VIDED. (Distributed)
Nov 02 2017	Record received from U.S.C.A. 3rd Circuit is electronic.
Nov 13 2017	Motion of Professor Ryan M. Rodenberg for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Nov 13 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 15 2017	Reply of petitioners Christopher J. Christie, Governor of New Jersey, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

Dec 04 2017	Argued. For petitioners: Theodore B. Olson, Washington, D. C. For respondents: Paul D. Clement, Washington, D. C.; and Jeffrey B. Wall, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) VIDED.
Jan 19 2018	Letter of petitioner pursuant to Rule 35.3 filed. **Main Document**

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RECORD AND BRIEFS

16-476
No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court's decision in *New York* v. *United States*, 505 U.S. 144 (1992), holds that the Constitution's fundamental federal structure does not permit Congress to "directly . . . compel the States to require or prohibit [certain] acts." *Id.* at 166. In September 2013, the U.S. Court of Appeals for the Third Circuit upheld the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et seq.*, against a constitutional challenge under *New York* by construing PASPA's proscription against States "authoriz[ing]" sports wagering "by law" narrowly to prohibit only the "affirmative 'authorization by law' of gambling schemes," and not repeals by States of existing sports wagering prohibitions. *See Nat'l Collegiate Athletic Ass'n* v. *Gov. of N.J.* (*Christie I*), 730 F.3d 218, 233 (3d Cir. 2013). After New Jersey then proceeded to repeal certain of its prohibitions on sports wagering in specified venues in the State, the *en banc* court reversed course and interpreted PASPA as making it "unlawful" for New Jersey to repeal its prohibitions and affirmed an injunction that requires the State to reinstate the repealed state-law prohibitions. The court then held that it was constitutional for federal law to dictate the extent to which States must maintain their prohibitions on sports wagering.

The question presented is:

Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York* v. *United States*, 505 U.S. 144 (1992)?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Defendants below were Christopher J. Christie, Governor of the State of New Jersey; David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; Frank Zanzuccki, Executive Director of the New Jersey Racing Commission; the New Jersey Thoroughbred Horsemen's Association, Inc.; the New Jersey Sports & Exposition Authority; Stephen M. Sweeney, President of the New Jersey Senate; and Vincent Prieto, Speaker of the New Jersey General Assembly.

Plaintiffs below were the National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the Commissioner of Baseball.

The United States of America participated as an *amicus curiae* in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Christopher J. Christie, David L. Rebuck, and Frank Zanzuccki ("State Petitioners") and Stephen M. Sweeney and Vincent Prieto ("Legislator Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the *en banc* court of appeals is not yet published but is available at ---F.3d---, 2016 WL 4191891 (3d Cir. Aug. 9, 2016). *See* Pet. App. A. The opinion of the three-judge panel of the court of appeals is reported at 799 F.3d 259 (3d Cir. 2015). *See* Pet. App. C.

The opinion of the district court granting summary judgment to the respondents and the order enjoining the State and Legislator Petitioners from giving effect to a repeal of state-law prohibitions on sports wagering is reported at 61 F. Supp. 3d 488 (D.N.J. 2014). *See* Pet. Apps. D, E.

JURISDICTION

The court of appeals entered its opinion on August 9, 2016 after *en banc* rehearing was granted on October 14, 2015. *See* Pet. App. G. An amended opinion was issued on August 11, 2016 to reflect that Judge Restrepo joined Judge Fuentes's dissent. That amendment did not alter the filing date of the judgment. *See* Pet. App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the Third Circuit was based on 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Tenth Amendment, the Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3701 *et seq.* ("PASPA"), New Jersey's Sports Wagering Law, P.L. 2011, c. 231 ("2012 Law"), and its 2014 repeal, P.L. 2014, c. 62 ("2014 Act"), are set forth at Appendix H to this petition.

STATEMENT

PASPA purports to make it unlawful for States to "authorize by law" gambling on sports. In three divided, irreconcilable, and fundamentally incomprehensible decisions, the Third Circuit rejected New Jersey's challenge that PASPA unconstitutionally commands how it regulates such gambling within its borders.

In particular, the Third Circuit concluded, in a divided *en banc* decision (with dissents by both the author and dissenter in *Christie I*), that PASPA's language precluding States from "authoriz[ing]" sports wagering "by law" bars New Jersey not only from licensing sports wagering, but also from enacting legislation repealing its sports wagering prohibitions in casinos and at racetracks. The Third Circuit reached that conclusion notwithstanding its panel decision three years earlier that PASPA was constitutional precisely because it *did not* prohibit States from repealing prohibitions on such wagering and therefore left the States ample room to define their own regulatory policies with respect to that type of gambling. As a result of the Third Circuit's most recent decision,

New Jersey now is compelled by federal law and federal courts to maintain state-law prohibitions that its elected officials chose to lift.

This federal takeover of New Jersey's legislative apparatus is dramatic, unprecedented, and in direct conflict with this Court's Tenth Amendment jurisprudence barring Congress from controlling how the States regulate private parties. Never before has congressional power been construed to allow the federal government to dictate whether or to what extent a State may repeal, lift, or otherwise modulate its own state-law prohibitions on private conduct. And never before has federal law been enforced to command a State to give effect to a state law that the State has chosen to repeal. The federal government lacks power to compel States to "regulat[e] pursuant to Congress' direction." *New York* v. *United States*, 505 U.S. 144, 174 (1992). It therefore must also lack power to command through a federal-court injunction that a State maintain on its books a state-law prohibition on private conduct that the State, as a matter of *its* sovereign authority over *its* citizens, has decided to repeal.

If Congress can freeze in place existing state laws by prohibiting contrary state-law "authorizations," then the federal government can effectively force States to enact federal policies and thus will have greatly aggrandized its own power while foisting accountability for those policies entirely onto the States. Future efforts by States to legalize private conduct currently prohibited by state law—anything from recreational use of marijuana, to carrying concealed firearms, to working on Sundays—can be thwarted not just by a direct federally enforced prohibition of that

conduct, but now also by a federal ban on state legislation that "authorizes" such conduct. This is not a minor intrusion on state sovereignty. It is a sea change to our system of federalism. This Court should grant the petition to protect the Constitution's carefully calibrated federal-state design and restore the balance between state and federal power that the Third Circuit's decision has so thoroughly upended.

A. The Professional And Amateur Sports Protection Act

For much of the country's history, nearly all States prohibited wagering on sports. Nevada legalized sports wagering in 1949, but as of 1992, no other State had broadly permitted such wagering. In that year, in response to a suggestion that other States were considering emulating Nevada by relaxing their prohibitions on sports wagering (*see* S. Rep. No. 102-248, at 5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3556), Congress enacted PASPA, which the U.S. Department of Justice opposed because it raised serious "federalism issues." Pet. App. H.

Unwilling to take the responsibility for prohibiting sports betting directly under federal law—perhaps due to its popularity in Nevada—Congress in PASPA purported to regulate the content of ***state laws*** concerning sports wagering—by making it "unlawful" for "***a governmental entity*** to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering (28 U.S.C. § 3702(1) (emphasis added)) or for an individual to do the same "pursuant to [a state] law" (*id.* § 3702(2)).

Nevada was, of course, exempted from PASPA's proscription of state regulatory authority of sports wagering and remained free to license and regulate sports wagering as it had since 1949. Pet. App. 123a. The three other States that had legalized limited sports wagering schemes in connection with their state lotteries—Montana, Delaware, and Oregon—also were permitted by PASPA to continue to sponsor those very limited schemes. Finally, PASPA also gave New Jersey (but no other State) permission to authorize, license, and otherwise regulate sports wagering, but only in Atlantic City, and only if a measure were enacted within one year of PASPA's effective date. 28 U.S.C. § 3704(a)(3). New Jersey, at that time, chose not to do so.

B. The 2012 Sports Wagering Law

Two decades later, faced with a massive, unregulated underground gambling industry, New Jersey voters approved an amendment to the State's constitution that permitted the Legislature to legalize, regulate, and control sports wagering. The Legislature soon did so, passing the 2012 Law, P.L. 2011, c. 231, with overwhelming bipartisan support. The 2012 Law modified the State's longstanding ban on sports wagering and provided for the licensing of sports-wagering pools at casinos and racetracks in the State. Regulations setting up a comprehensive regime for the licensing and close supervision of sports-wagering pools—including licensing fees, internal control approvals, reserve requirements, and detailed financial documentation—soon followed. *See* N.J. Admin. Code § 13:69N-1.1 *et seq.* In short, the 2012 Law vested state regulators with comprehensive supervisory authority (much like Nevada) over nearly every aspect of

sports wagering in New Jersey and ensured that no sports wagering would take place unless it was affirmatively licensed, regulated, and approved by state authorities.

C. The *Christie I* Litigation

Several professional sports leagues and the National Collegiate Athletic Association (the "Leagues") filed a lawsuit shortly after the 2012 Law was passed, challenging it and the proposed regulations as violating PASPA.

The State responded that PASPA is unconstitutional because it mandates that States "regulat[e] pursuant to Congress' direction," in violation of the anti-commandeering principle set forth in *New York*, 505 U.S. at 174.

The district court granted summary judgment to the Leagues on the ground that Congress, in enacting PASPA, was exercising only its "power to *restrict*, rather than *compel*," and thus PASPA did not violate the anti-commandeering doctrine. *Nat'l Collegiate Athletic Ass'n* v. *Christie*, 926 F. Supp. 2d 551, 571 (D.N.J. 2013).

A divided court of appeals affirmed, but on different grounds. The majority acknowledged that a federal statute requiring States to maintain prohibitions on private conduct would raise "a series of constitutional problems." Pet. App. 160a. To avoid them, the majority construed PASPA as not "prohibit[ing] New Jersey from repealing its ban on sports wagering." *Id.* at 158a, 160a. As such, the panel majority concluded that the States retained "much room . . . to make their own policy"; they could "enforce the laws they choose

to maintain." *Id.* at 161a, 163a. "*All that is prohibited,*" the majority declared, "is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] *by law*' of gambling schemes." *Id.* at 158a (first emphasis added).

Judge Vanaskie dissented from the majority's constitutional analysis of PASPA, declaring that "PASPA prohibits [S]tates from authorizing sports gambling and thereby directs how *[S]tates* must treat such activity"—to wit, they must either "allow[] totally unregulated betting on sporting events or prohibit[] all such gambling" (Pet. App. 178a), a choice that he did not believe left States much "room" to "make their own policy on sports wagering" (*id.* at 197a n.9). This lack of choice, he continued, "violates the principles of federalism as articulated by the Supreme Court in . . . *New York* . . . and *Printz*." *Id.* at 178a.

D. The *Christie I* Petition For Certiorari

The defendants petitioned for certiorari, arguing that even as narrowed by the Third Circuit, PASPA remained unconstitutional. The State urged that the "ability of the States to convey a 'label of legitimacy' on private conduct" by licensing or authorizing it by law "lies at the heart of their retained sovereignty" and that PASPA improperly infringes on that sovereignty by "regulat[ing] the approval or disapproval expressed by the States." State Pet. for Certiorari at 2–3, *Christie* v. *Nat'l Collegiate Athletic Ass'n*, Nos. 13-967, 13-979, and 13-980 (U.S. Feb. 12, 2014). That PASPA "frame[d] its dictate as a prohibition" against authorization of sports wagering, the State argued,

did not diminish the unconstitutional exercise of federal control over the State's regulation of private conduct. *Id.* at 3.

The Leagues denied any commandeering of state regulatory authority because "[n]othing in [the] unambiguous language [of PASPA] compels [S]tates to prohibit or maintain *any* existing prohibition on sports gambling." Brief of Leagues in Opposition at 23, *Christie I*, Nos. 13-967, 13-979, and 13-980 (U.S. May 14, 2014) (hereinafter, "Leagues Opp.") (emphasis added). The Leagues maintained that PASPA was "like any other express preemption clause," specifying "only what [S]tates *may not* do, which is license or authorize sports gambling." *Ibid.*; *see also ibid.* ("PASPA does not prohibit [S[tates from eliminating sports gambling prohibitions entirely should they so choose, or even require [S]tates to enforce whatever prohibitions they opt to maintain."). Indeed, the Leagues agreed that "[w]hen a [S]tate merely lifts an existing prohibition but does not authorize any sports gambling, there is no 'gambling pursuant' to state law." *Id.* at 24 n.4.

The United States made the same argument in its opposition brief, urging this Court that, under the Third Circuit's construction of PASPA, States were free to repeal their prohibitions on sports wagering "*in whole or in part.*" Brief for the United States in Opposition at 11, *Christie I*, Nos. 13-967, 13-979, and 13-980 (U.S. May 14, 2014) (hereinafter, "U.S. Opp.") (emphasis added). This Court denied the petition.

E. New Jersey Repeals Its Prohibitions On Sports Wagering In Certain Venues

After this Court denied certiorari, the New Jersey Legislature took the Third Circuit, the Leagues, and the United States at their word that a State may repeal its sports wagering ban, in the words of the United States, "in whole or in part." U.S. Opp. at 11. The Legislature passed the 2014 Act, P.L. 2014, c. 62—again with an overwhelming bipartisan consensus—and the Governor signed the bill into law the following day. In sharp contrast to the 2012 Law, the 2014 Act does not affirmatively license or authorize sports wagering or create a regulatory scheme around it. Instead, the 2014 Act "partially repeal[s] the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sports contests or athletic events." *Id.*

Specifically, the 2014 Act repeals provisions in the criminal code (*see* N.J. Stat. Ann. § 2C:37-1 *et seq.*); the civil code (*see* N.J. Stat. Ann. § 2A:40 *et seq.*), including the Casino Control Act (N.J. Stat. Ann. § 5:12-1 *et seq.*), and other provisions in chapter 5 of Title 5 of the Revised Statutes (governing racetracks); as well as "any rules and regulations" that "prohibit participation in or operation of" a sports-wagering pool to the extent those laws apply at casinos, racetracks, and former racetracks (P.L. 2014, c. 62, § 1).[1] It also repeals the 2012 Law in its entirety (*id.* § 5); and repeals

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[1] The 2014 Act also limits the repeal to "the placement and acceptance of wagers on professional, collegiate, or amateur sports contests or athletic events by persons 21 years of age or older" and excludes "a collegiate sport contest or . . . athletic event that takes place in New Jersey or a sport contest or athletic

"any rules and regulations that may require or authorize any State agency to license, authorize, permit, or otherwise take action to allow any person" to engage in sports wagering (*id.* § 1). The 2014 Act further expressly states that its provisions are "not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law" sports wagering, but instead are to be "construed to repeal State laws and regulations" at designated locations. *Id.* § 2. Considered as a whole, the 2014 Act thus makes New Jersey's pre-existing civil and criminal prohibitions on sports wagering inapplicable—indeed, nonexistent—as to most sports wagering activities undertaken in casinos and current and former racetracks in the State.

By design, the 2014 Act contains none of the licensing and regulatory provisions that were the centerpiece of the 2012 Law and that *Christie I* held violated PASPA. The 2014 Act does not require prospective operators to acquire any special license to operate a sports pool, nor does it restrict the individuals or entities that are eligible to operate a sports pool at a casino, racetrack, or former racetrack. As the undisputed record before the district court makes clear, the State's primary gaming and horse racing regulatory agencies—the Division of Gaming Enforcement, the Casino Control Commission, and the New Jersey Racing Commission—are stripped of authority under the 2014 Act to engage in any regulation of sports wagering, including investigating the background or financial health of sports-wagering vendors (Dist. Ct. D.E.

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event in which any New Jersey college team participates regardless of where the event takes place." P.L. 2014, c. 62 § 1.

52-1 ¶¶ 26, 27); evaluating employees or their credentials (*id.* ¶ 30); or requiring sports-pool lounges to use specific surveillance and security measures (*id.* ¶ 33). In short, under the 2014 Act, the State would play *no role* in licensing, authorizing, operating, or regulating sports betting in those locations where New Jersey's prohibitions had been repealed. Rather, any sports betting by adults that would take place in those locations would be a purely private matter, outside the purview of state laws.

F. *Christie II* District Court Proceedings

The Leagues responded to the 2014 Act with a new lawsuit alleging that the Act constitutes an attempt to "sponsor, operate, advertise, promote, license, or authorize gambling on amateur and professional sports at state-licensed casinos and horse racetracks." Dist. Ct. D.E. 1 ¶ 1. Because the 2014 Act's repeal is limited to certain locations that otherwise are licensed by the State, the Leagues argued, "the 2014 [Act] is an authorization, rather than the repeal that it purports to be." *Id.* ¶ 7.

The district court held that the 2014 Act violated PASPA and permanently enjoined the State "from violating PASPA through giving operation or effect to the 2014 Law in its entirety." Pet. App. 113a. In so holding, it thus requires the State to resurrect and maintain prohibitions on private conduct the State itself chose to repeal. The court reasoned that, notwithstanding the United States' position that New Jersey was free to repeal its prohibitions "in whole or in part" (U.S. Opp. at 11), *Christie I* "interprets PASPA to allow [S]tates only . . . two options": "either maintain

[their] prohibition[s] on sports betting or . . . completely repeal" them." *Id.* at 99a–100a.

G. The Third Circuit Panel Decision In *Christie II*

A divided panel of the Third Circuit affirmed, though not on the rationale provided by the district court, and only after distancing itself from the construction of PASPA in *Christie I*. Without acknowledging that *Christie I* construed PASPA to avoid "a series of constitutional problems" (Pet. App. 160a), the *Christie II* panel majority concluded that the 2014 Act "authorizes sports gambling by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling." *Id.* at 60a. According to the majority, "[t]hat selectiveness constitutes specific permission and empowerment" that violates PASPA. *Ibid.*

In holding that a refusal to prohibit constitutes "specific permission and empowerment" by a State in violation of PASPA, the *Christie II* panel majority called into doubt whether or how a State ever could legalize or even fail to prohibit sports wagering within its borders consistent with PASPA. The *Christie II* panel majority thus plainly contradicts *Christie I*'s holding that PASPA left the States "much room" to formulate policy with respect to sports wagering, including room to repeal pre-existing prohibitions. Pet. App. 161a. Yet the *Christie II* panel majority did not otherwise address the "series of constitutional problems" that *Christie I* foresaw if PASPA were construed to prohibit States from repealing or amending their prohibitions on sports wagering. Instead, it cast aside

the State's commandeering objections simply as having been rejected in *Christie I*. *See id.* at 59a n.5 (rejecting the constitutional argument by stating "we held otherwise in *Christie I* and we cannot and will not revisit that determination here"—despite completely overriding the reasoning in *Christie I* that provided the basis for that conclusion).

Judge Fuentes—the author of *Christie I*—dissented, stating that the majority's reasoning that a "partial repeal amounts to authorization" was "precisely the opposite of what we held in *Christie I*." Pet. App. 67a, 72a. *Christie I* had held that "'[n]othing in [PASPA's] words *requires* that the [S]tates keep any law in place,'" and it was on that basis that the majority "found PASPA did not violate the anti-commandeering principle." *Id.* at 72a. "If withdrawing prohibitions on 'some' sports wagering is the equivalent to authorization by law," Judge Fuentes explained, "then withdrawing prohibitions on *all* sports wagering must be considered authorization by law" as well, leaving New Jersey "with no choice at all" with respect to state regulation of sports wagering within its borders. *Id.* at 71a–72a.

H. The Third Circuit *En Banc* Decision In *Christie II*

The Third Circuit granted rehearing *en banc* and affirmed the district court by a vote of 9-to-3. The *en banc* majority adopted the panel majority's analysis as to the question whether the 2014 Law was an "authoriz[ation] by law" in violation of PASPA (Pet. App. 10a), but "excise[d]" "as unnecessary dicta" the central and critical portions of *Christie I* holding that PASPA was constitutional precisely because it permits States

to repeal prohibitions on sports wagering (*id.* at 23a). Thus, the majority held that "a [S]tate's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization' under PASPA." *Ibid.*

Turning to the constitutional question, the majority began by acknowledging that "Congress 'lacks the power directly to compel the States to require or prohibit' acts which Congress itself may require or prohibit." Pet. App. 18a (quoting *Christie I*, 730 F.3d at 227 (quoting *New York*, 505 U.S. at 166)). But the majority nonetheless found that PASPA's prohibition of the 2014 Act was "more akin to those laws upheld in" *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), *FERC* v. *Mississippi*, 456 U.S. 742 (1982), *South Carolina* v. *Baker*, 485 U.S. 511 (1988), and *Reno* v. *Condon*, 528 U.S. 141 (2000), "and distinguishable from those struck down in *New York* and *Printz*." Pet. App. 22a.

The majority characterized PASPA as a prohibition on state action—not as a positive requirement that the States "enact laws or implement federal statutes or regulatory programs" (Pet. App. 19a)—and "reject[ed]" New Jersey's argument that prohibiting a repeal such as the 2014 Act requires New Jersey "to affirmatively keep the prohibition on the books" (*id.* at 23a). The majority reasoned that PASPA's prohibition on limited repeals still "afford[s]" States "sufficient room . . . to craft their own policies." *Ibid.* But, in describing that supposed "room," the majority said only that "not all partial repeals are created equal." *Id.* at 24a. It suggested that a law that permitted a "*de minimis*" amount of wagering between family and

friends might be permitted under PASPA (*ibid.*), but did not explain why that would not constitute a forbidden "authoriz[ation] by law" (*ibid.*). Instead, it decreed it "need not . . . articulate a line" demarcating which repeals a State is entitled to enact. *Ibid.*

The majority thus reached the remarkable and unprecedented conclusion that the Constitution's federal structure affords to Congress the power to prohibit States from repealing their own laws.

Judge Fuentes, Judge Restrepo, and Judge Vanaskie dissented. Judge Fuentes reprised the themes of his dissent from the panel opinion, taking issue with the majority's attempt to "infer[]" authorization by law from a repeal that did not "grant . . . permission" to anyone and left "no laws governing sports wagering" at selected locations. Pet. App. 28a, 31a. In short, it was not the kind of "specific legislative enactment that affirmatively allows the people of the [S]tate to bet on sports"; "[a]ny other interpretation," he said, "would be reading the phrase 'by law' out of the statute." *Id.* at 28a.

To demonstrate that the majority's analysis lacked logical foundation, Judge Fuentes posed a hypothetical in which the State repealed all of its sports waging prohibitions and "later enacted limited restrictions regarding age requirements and places where wagering could occur." Pet. App. 32a. "Surely," he said, "no conceivable reading of PASPA would preclude a [S]tate from *restricting* sports wagering in this scenario. Yet the 2014 Repeal comes to the same result" and is deemed unlawful. *Ibid.*

Judge Vanaskie wrote separately, explaining that his "skepticism" about PASPA's constitutionality from

Christie I was "validated by today's majority opinion" and the disappearance of any "room" that might once have existed for States to make policy. Pet. App. 35a. "Implicit in today's majority opinion and *Christie I*," he wrote, "is the premise that Congress lacks the authority to decree that States must prohibit sports wagering, and so both majorities find some undefined room for States to enact partial repeals of existing bans on sports gambling." *Id.* at 36a. But this "shifting line approach to a State's exercise of its sovereign authority is untenable," and "[t]he bedrock principle of federalism that Congress may not compel the States to require or prohibit certain activities cannot be evaded by the false assertion that PASPA affords the States some undefined options." *Ibid.* Under the *en banc* majority's opinion in *Christie II*, Judge Vanaskie predicted, "no repeal of any kind will evade the command that no State 'shall . . . authorize by law' sports gambling." *Id.* at 42a. This Court, he said, "has never considered Congress' legislative power to be so expansive." *Id.* at 45a.

REASONS FOR GRANTING THE PETITION

Two years ago, New Jersey petitioned for certiorari on the ground that PASPA, even as narrowed by the Third Circuit in *Christie I*, unconstitutionally commandeered the State's government by forcing it to prohibit sports betting and preventing it from enacting a regime to license, regulate, and control sports betting at the State's casinos and racetracks. The Leagues successfully urged the Court to reject the petition by insisting that the narrowly construed statute does not infringe New Jersey's sovereignty because it does not "compel [S]tates (or state officials) to do any-

thing"; it "only *prohibits* [S]tates from licensing or authorizing sports gambling." Leagues Opp. at 18. The United States went further, representing to the Court that PASPA "does not even obligate New Jersey to leave in place the state law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment" and that the State was "free to repeal those prohibitions *in whole or in part*." U.S. Opp. at 11 (emphasis added).

When New Jersey acted in reliance on those representations, the Third Circuit reversed course. New Jersey, the *en banc* court held in *Christie II*, was not "free to repeal [its] prohibitions in whole or in part," as the United States had argued to this Court; instead, the *en banc* majority held that PASPA prohibits a state law that results in the occurrence of sports wagering that, "absent the [repeal]," would be prohibited under state law. Pet. App. 12a. And while the Leagues had insisted PASPA does not "compel [S]tates (or state officials) to do anything" (Leagues Opp. at 18), the injunction affirmed by the Third Circuit directly compels petitioners to maintain in effect state-law prohibitions that New Jersey officials, in accordance with the wishes of the people who elected them, repealed. And, state officials are, of course, obliged under New Jersey's constitution to enforce these prohibitions as long as they are on the books.

When petitioners sought certiorari of the Third Circuit's earlier decision upholding its much narrower construction of PASPA, the Leagues argued in opposition that PASPA is a narrow statute that has rarely been challenged and thus is unworthy of this Court's review. But after the *en banc Christie II* decision,

whatever PASPA is, it is not narrow. Whereas *Christie I*'s construction of PASPA (compelled by principles of constitutional avoidance) supposedly left States with "much room" to "make their own policy" through repeals of prohibitions and waivers of enforcement (Pet. App. 161a), that "room" now seemingly has shrunk so much as to preclude nearly any enactment that relaxes state-law prohibitions on sports wagering as to particular persons or places. Indeed, while the supposed existence of certain options for legalization of sports wagering was vital to the Third Circuit's constitutional analysis, the *en banc* decision backhandedly dismissed any suggestion that it ought to provide States with meaningful guidance as to how they might permissibly regulate their own citizens with respect to this subject, as a number have sought to do.[2]

A State's power to repeal or amend its own laws concerning private conduct is not a marginal issue that can be confined to the specific context of PASPA and sports wagering. The Third Circuit's limitations on this Court's anti-commandeering doctrine authorize Congress to make broad incursions into the States' ability to regulate conduct within their borders not just with policies of preemption administered by the *federal* government, but by demanding the existence, enforcement, and maintenance of prohibitions under *state* law. In so holding, the Third Circuit has given

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[2] Multiple states, including California, Delaware, Illinois, Indiana, Michigan, Minnesota, Mississippi, New York, Pennsylvania, South Carolina, and Texas have recently expressed interest in having sports wagering within their borders. *See, e.g.*, Will Green, "Will New Jersey Take A Third Swing At Legal Sports Betting Via 'Friends and Family' Approach?", *Legal Sports Report* (Aug. 22, 2016) http://www.legalsportsreport.com/11157/nj-sports-betting-possiblities/.

Congress virtually unbounded discretion to dictate whether and how the States may make changes to their own state laws regulating private conduct within their borders.

The Third Circuit's *en banc* decision is transformative of the relationship between the state and federal governments, and is starkly at odds with this Court's anti-commandeering precedents. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union . . . ." *Texas* v. *White*, 74 U.S. (7 Wall.) 700, 725 (1869); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816) (describing the question of how to allocate powers between the federal and state governments as one of "great importance and delicacy"). This Court's intervention is needed to secure these fundamental underpinnings of our federalism.

I. THE THIRD CIRCUIT'S DECISION FLOUTS THIS COURT'S ANTI-COMMANDEERING PRECEDENTS, DIMINISHES THE ACCOUNTABILITY OF STATE OFFICIALS, AND INFRINGES STATES' SOVEREIGN RIGHTS

This Court's anti-commandeering precedents set forth a straightforward principle that is fundamental to our federalist system of dual sovereignty: Congress may regulate commerce directly, but may not "regulate state governments' regulation of interstate commerce." *New York* v. *United States*, 505 U.S. 144, 166 (1992); *Printz* v. *United States*, 521 U.S. 898, 924 (1997). Accordingly, Congress may not "directly . . . compel the States to require or prohibit[] certain acts."

New York, 505 U.S. at 166. Yet, as construed by the Third Circuit, PASPA requires New Jersey to maintain prohibitions its legislature has repealed and thus operates squarely against that prohibition.

Although the Third Circuit initially construed PASPA's prohibition on "authoriz[ing] by law" as reaching only acts of licensing, sponsorship, or affirmative approval of sports wagering by the State, that same court, over the dissenting vote of the author of that decision, has now construed that same prohibition also to forbid a vast array of repeals and other modifications of state-law prohibitions on sports wagering. And pursuant to that construction, the Third Circuit has approved a federal law that commands a sovereign State to continue to give effect to state-law prohibitions on certain gambling activities that its elected officials have chosen to repeal. That injunction—not the acts of New Jersey's elected officials—now dictates the contents of the laws of the State of New Jersey concerning sports wagering and thus unmistakably dictates the terms of "state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166.

The Third Circuit's conclusion that such a federal prescription of state law is constitutionally permissible is premised on a misreading of this Court's anti-commandeering precedents, scrambles lines of accountability among federal and state elected officials, and generates an unacceptable amount of uncertainty as to how States may exercise their police power. This Court should grant the petition to ensure that the anti-commandeering principle, a bedrock of federalism, does not dissolve into irrelevance.

A. The Third Circuit's Opinion Departs From This Court's Anti-Commandeering Precedents

1. This Court's seminal decision in *New York* explains that the rule barring Congress from dictating the way States regulate private conduct is grounded in the Constitution's structure of enumerated powers. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States"; conversely, "if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156. Among the "attribute[s] of state sovereignty reserved by the Tenth Amendment," and possibly the most important of all, is the power of States to determine the content of their own laws. *See FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982) ("the ability of a state legislative . . . body . . . to consider and promulgate regulations of its choosing" is a "quintessential attribute of sovereignty" "central to a State's role in the federal system").

Thus it has long been accepted that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York*, 505 U.S. at 161 (quoting *Hodel* v. *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). Indeed, "the Constitution never has been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions." *Id.* at 162. The Tenth Amendment thus confirms that "[t]he allocation of power contained in the Commerce Clause" while it "authorizes Congress to

regulate interstate commerce directly," "does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.* at 166.

Yet, as construed by the Third Circuit, that is precisely what PASPA does—it requires States to "prohibit [certain] acts"—specifically, sports wagering in casinos and racetracks—that New Jersey no longer wishes to prohibit. Any doubt about that is resolved by the district court's injunction that prohibits New Jersey from giving effect to the 2014 Act's repeal, and unmistakably commands New Jersey to maintain in place the prohibitions that New Jersey's democratically elected officials voted to lift. The injunction makes plain that, within the field of sports wagering, New Jersey must "govern according to Congress' instructions." *New York*, 505 U.S. at 166. This Court's cases forbid that result.

2. The *en banc* Third Circuit concluded that interpreting PASPA to ban the 2014 Act's repeal "did not run afoul of anti-commandeering principles" (Pet. App. 18a) and "reject[ed]" the argument that PASPA "requir[es] the [S]tates to affirmatively keep a prohibition against sports wagering on their books." *Id.* at 23a. "PASPA does not," the court maintained, "command [S]tates to take affirmative actions, and it does not present a coercive binary choice," as the district court had suggested. *Ibid.* According to the majority, that PASPA prohibits repeals such as the 2014 Act "does not mean that [S]tates are not afforded sufficient room under PASPA to craft their own policies." *Ibid.*

a. The notion that the Third Circuit's interpretation "afford[s] sufficient room" for States to determine

how they will regulate sports wagering is both flatly incorrect and irrelevant. It is incorrect because the court held that, in addition to any type of limited legalization attempted through a state-run licensing regime, PASPA also prohibits a repeal that "selectively grants permission to certain entities to engage in sports wagering." Pet. App. 14a. What options does this leave for New Jersey to stanch black market wagering throughout the State? The Third Circuit would not say, except to suggest that a law permitting "*de minimis* wagering between friends and family would not have nearly the type of authorizing effect that we find in the 2014 Law." *Id.* at 24a. But the court did not explain why such legislation would not also "selectively grant[] permission" to engage in sports wagering. And, of course, to say that a law does not have "nearly the same authorizing effect" as the 2014 Act is not a statement that such a law would not violate PASPA. If the decision below leaves any "room" at all for the States to exercise their sovereign authority over a field of interstate commerce among private persons that Congress has chosen not to preempt, that "room" is, as Judge Vanaskie observed in dissent, "undefined." *Id.* at 36a.

In actual fact, the Third Circuit has prohibited New Jersey from repealing a state law prohibiting sports wagering and judicially decreed that that law be restored, and presumably enforced. In the end, however, whether the Third Circuit's construction of PASPA leaves States with ample "room" to define the parameters of sports wagering, or practically none at all, is irrelevant. To be sure, when federal law "leaves no 'policymaking' discretion with the States" that "worsens the intrusion upon state sovereignty."

Printz, 521 U.S. at 928. But it is ultimately no defense to an anti-commandeering violation that a law only dictates *some* aspects of the State's regulation of its citizens. To require the State to maintain ***any*** state law prohibition that it wishes to repeal is "fundamentally incompatible with our constitutional system of dual sovereignty." *Id.* at 935.

Even if PASPA gave States free rein to legalize sports wagering (in whole or in part) within their borders, except for a single federal requirement commanding States to prohibit sports wagering in casinos, the latter requirement still reduces States "to puppets of a ventriloquist Congress" as to the prohibition that the State is compelled to maintain. *Printz*, 521 U.S. at 935 (quoting *Brown* v. *EPA*, 521 F.2d 827, 839 (9th Cir. 1975)). Our system of federalism requires that the States "remain independent and autonomous within their proper sphere of authority." *Id.* Absent a valid exercise of the commerce power and the Supremacy Clause, the States' sphere of authority indisputably includes the power to define the content of their own state laws; "[i]ndeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC*, 456 U.S. at 761. This is why Congress lacks power to "directly . . . compel the States to require or prohibit [certain] acts." *New York*, 505 U.S. at 162, 166.

b. Perhaps recognizing that the "room" for policymaking its decision purported to leave was more illusory than real, the Third Circuit *en banc* majority also held that PASPA did not implicate this Court's anti-commandeering precedents "because [PASPA] does not require [S]tates to take any action" and "includes no coercive direction by the federal government." Pet.

App. 25a. But an injunction is the very definition of a "coercive direction," and the injunction here undisputedly requires New Jersey to maintain state-law prohibitions that, as far as state lawmakers are concerned, should not exist.

That PASPA does not include a requirement on States to affirmatively enact positive law does not change the analysis. As Judge Kozinski has explained, "preventing [a] [S]tate from repealing an existing law is no different from forcing it to pass a new one; in either case, the [S]tate is being forced to regulate conduct that it prefers to leave unregulated." *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). That is what PASPA does: It requires New Jersey to prohibit sports wagering in casinos and racetracks even though New Jersey's elected officials have chosen not to. And that is exactly the line—whether the law "require[s] the States in their sovereign capacity to regulate their own citizens"—that this Court in *Reno* v. *Condon* said could not be crossed. *See* 528 U.S. 141, 151 (2000). Whether Congress drafts positive law for the States, or requires States to maintain existing state laws on the books, Congress is conscripting the legal apparatus of the States to implement federal policy. For more than a century, this Court has recognized that Congress lacks such power. *See Coyle* v. *Smith*, 221 U.S. 559, 564 (1911) (finding that a federal law providing that the location of Oklahoma's capital "shall not be changed" before a certain date impermissibly restricted Oklahoma's sovereignty).

3. The Third Circuit attempted to locate support for its analysis in this Court's earlier anti-commandeering decisions, concluding that PASPA was "more

like" the laws at issue in *Hodel*, *FERC*, *Reno*, and *South Carolina* v. *Baker*, 485 U.S. 511 (1988), than *New York* or *Printz*. But the court fundamentally misread those pre-*New York* decisions.

a. With respect to *Hodel* and *FERC*, the Third Circuit correctly stated that "congressional action in passing laws in otherwise pre-emptible fields has withstood attack in cases where the [S]tates were not compelled to enact laws or implement federal statutes or regulatory programs themselves." Pet. App. 19a. But the court offered no explanation of how PASPA—which compels States to maintain state laws—possibly could fall within the scope of this proposition.

Nor could it, because both *Hodel* and *FERC* depend on the explicit and unambiguous finding that the statutes at issue ultimately did not "command . . . the States to promulgate and enforce laws and regulations." *FERC*, 456 U.S. at 762. Instead the statutes at issue in *Hodel* and *FERC* were examples of "cooperative federalism" (*Hodel*, 452 U.S. at 294), in which the federal government set conditions on continued state regulation in fields that Congress otherwise had authority to preempt. *Hodel* upheld a federal statute governing surface coal mining that gave States the choice of either adopting federal performance standards as their own or deferring to direct federal regulation of the activity. *Id.* at 288. And *FERC* turned back a challenge to provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA") that similarly allowed States to continue regulating within the federally pre-emptible area of electricity and natural gas

ratemaking "on the condition that they *consider* suggested federal standards." 456 U.S. at 763.[3]

But PASPA does not remotely resemble these "cooperative federalism" programs. Quite unlike the surface mining statute in *Hodel*, PASPA creates no federally administered regulatory program to which States may elect to defer; PASPA instead requires States to maintain their own state-law prohibitions in the service of federal objectives. And PURPA, which this Court characterized as "one step beyond *Hodel*" (*FERC*, 456 U.S. at 764), did not require anything beyond "consideration" of federal regulatory suggestions. "While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," the Court observed that "there is nothing in PURPA 'directly compelling the States' to enact a legislative program." *Id.* at 762, 765; *see also id.* at 762 n.26 (acknowledging previously expressed doubt "as to whether a state agency may be ordered actually to promulgate regulations having effect as a matter of state law" (internal quotation marks omitted)). But as interpreted by the Third Circuit, PASPA does not merely require States to *consider* federal regulatory suggestions; as the injunction in this case amply illustrates, it *requires* States to maintain state-law prohibitions. *Hodel* and *FERC*

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[3] *FERC* also considered a "troublesome" (456 U.S. at 759) challenge to the federal law's requirement that "Mississippi authorities adjudicate disputes arising under the [federal] statute." *Id.* at 760. This type of requirement was upheld in *Testa* v. *Katt*, 330 U.S. 386 (1947), as a permissible directive that state adjudicatory bodies heed federal law. *See FERC*, 456 U.S. at 760–61.

provide no support for PASPA's requirement that States maintain existing laws.[4]

b. *Baker* and *Reno* likewise are inapposite. The majority viewed the statutes at issue in those cases as examples of permissible "prohibitions on state action." Pet. App. 18a. Again, though, the Third Circuit failed to explain why PASPA's prohibition on repeals of state law is similarly permissible.

Baker addressed an anti-commandeering challenge to a federal statute prohibiting the issuance of bearer bonds. 485 U.S. at 513. *Reno* concerned a challenge to a federal statute "that prohibited states from releasing information gathered by state departments of motor vehicles." Pet. App. 21a. As the Third Circuit

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[4] This Court in *FERC* acknowledged that the "choice" presented to States by PURPA was "difficult" because a State could avoid the burden of considering federal standards only by "abandoning regulation of the field altogether" when "Congress has failed to provide an alternative regulatory mechanism to police the area in the event of such state default." 456 U.S. at 766. It is doubtful that this reasoning survives *National Federation of Independent Business* v. *Sebelius (NFIB)*, 132 S. Ct. 2566, 2602 (2012) (opinion of Roberts, C.J.) ("when pressure turns into compulsion . . . legislation runs contrary to our system of federalism") (internal quotation marks omitted). But if it does, certainly presenting States with the choice of abandoning all regulation of sports wagering when Congress similarly has failed to provide an alternative regulatory framework, or maintaining prohibitions according to Congress' instructions (not merely *considering* them) is many times more "difficult"—indeed, so difficult as to be coercive in the manner *NFIB* prohibits. *See Petersburg Cellular P'ship* v. *Bd. of Supervisors*, 205 F.3d 688, 703 (4th Cir. 2000) (where "abandonment" of an entire field of regulation "is not a viable option," the choice to "either submit to federal instruction or abdicate" regulation "amounts in reality to coercion"). Of course, the Third Circuit disclaimed that PASPA presents States with such a "coercive binary choice." Pet. App. 23a.

itself said, in *Baker* the statute was upheld because it "simply subjected a State to the same legislation applicable to private parties" rather than "seek[ing] to control or influence the manner in which States regulate private parties." Pet. App. 20a–21a (quoting *Christie I*, 730 F.3d at 228). And the law in *Reno* similarly regulated States simply as "owners of data bases" (528 U.S. at 142), and "d[id] not require the States in their sovereign capacity to regulate their own citizens." Pet App. 21a (quoting *Reno*, 528 U.S. 151 (as altered in *Christie I*, 730 F.3d at 228)).

PASPA stands wholly apart from these statutes. Far beyond regulating States on the same terms as private persons participating in an area of interstate commerce, PASPA absolutely does "seek to control or influence the manner in which States regulate private parties." *Baker*, 485 U.S. at 514. The injunction in this case, by requiring the State to give effect to prohibitions the State has repealed, plainly and unequivocally does "require the States in their sovereign capacity to regulate their own citizens." *Reno*, 528 U.S. at 142. Having crossed that line, PASPA cannot be said to be "consistent with the constitutional principles enunciated in *New York* and *Printz*." *Ibid.*

B. The Third Circuit's Ruling Diminishes The Accountability Of Elected Officials

The conscription of New Jersey's legislative apparatus in service of federal ends not only disturbs our federal system, but in doing so also interferes with the accountability and responsiveness of elected representatives. As this Court wrote in *Alden* v. *Maine*, 527 U.S. 706, 751 (1999), to preserve the "principle of rep-

resentative government," "the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State," and not by federal judicial decrees. An act by the federal government that circumscribes States' powers to repeal their own laws—and worse still, that does so only vaguely, and without describing what authority, if any, state representatives have to change state law—fundamentally undermines that representative function.

As this Court stated in *New York*, "when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate," "[a]ccountability is . . . diminished." 505 U.S. at 169. PASPA does exactly that: On paper, state law bars would-be wagerers from betting on sporting events at the State's casinos and racetracks, but in reality, it is federal law (and a federal court injunction) that compels the State to maintain those unwanted state-law prohibitions. The *en banc* opinion thus not only allows Congress to impose the burdens of enforcing its policy choices onto the States, but also enables Congress to hide behind the vagueness of PASPA and thereby avoid being held accountable for its unpopular prohibitions.

If the Third Circuit's construction of "authoriz[ation] by law" in PASPA as forbidding an undefined array of repeals is upheld, it is not difficult to imagine other examples in which Congress could dictate policy outcomes in States without ever having to legislate directly. Rather than enact gun control measures of its own, for example, Congress could prohibit States from relaxing existing restrictions on the purchase of firearms by particular persons. Or, no

longer willing to expend the resources to police limitations on the usage of marijuana, Congress could repeal its own prohibitions on the use and sale of marijuana and instead prohibit States from repealing their own restrictions by enacting a PASPA-like law that prohibits States from authorizing the sale or use of marijuana "by law." Because few States would accept the choice of having totally unregulated gun possession or marijuana usage, Congress could achieve its policy objectives of stopping the spread of firearms or marijuana use even as it sets up the federal government's own exit from those fields of regulation.

Such a federally imposed disability to "regulate in accordance with the views of the local electorate," certainly "diminish[es]" accountability of state officials, and thus is deeply destructive of the States' sovereignty within our federal system. *New York*, 505 U.S. at 169. For, as this Court recognized in *FERC*, "having the power to make decisions and to set policy is what gives the State its sovereign nature." 456 U.S. at 742. Within the field of sports wagering—an area in which Congress conspicuously has declined to regulate directly—PASPA has taken away that "quintessential aspect of sovereignty." *Ibid.*

C. The Third Circuit's Construction Of PASPA Infringes State Sovereignty By Perpetuating Uncertainty As To How States May Exercise Their Sovereign Rights

PASPA's conscription of States' sovereign authority to determine how much sports wagering to permit within their borders and the conditions under which such wagering may occur shakes the foundation of the

anti-commandeering doctrine and is reason enough to grant the petition. But this Court's review is particularly important given that the Third Circuit has denied States any meaningful guidance as to what regulatory options States may exercise over the booming black market for sports wagering (in 2013, a $500 billion industry nationwide, Pet. App. 122a).

It is clear from the *en banc* opinion that States within the Third Circuit cannot enact the repeal New Jersey enacted here. Pet. App. 16a. And the Third Circuit majority's focus on the targeted nature of the 2014 Act's repeal hints that a repeal of all sports wagering regulations all over the State still might be permissible under PASPA. *But see id.* at 14a ("[O]ur discussion of partial versus total repeals is similarly unnecessary to determining the 2014 Act's legality because the question presented here . . . does not turn on the way in which the [S]tate has enacted its directive."). What is permissible is unknown, although the Third Circuit did allude to the possibility of "*de minimis* wagers between friends and family." *Id.* at 24a.

But the permissibility of the range of options lying between complete repeal (maybe still permissible) and the 2014 Act (not permissible), on the one hand; or between the 2014 Act (not permissible) and *de minimis* wagering among friends (possibly permissible), on the other hand, is anything but clear. If there is a rule to be drawn from the majority's opinion, it is the illogical proposition that Congress may command that a State adopt only extreme positions—completely unregulated wagering, or no wagering at all save for *de minimis* wagering among friends. If the State wishes to adopt any middle ground, PASPA may well prohibit

it. But States will have to litigate to find out because the majority flatly refused to provide any guidance as to how extreme a state law must be before it might conceivably become permissible. Nor does it explain what would happen if a State combined two (possibly) *permissible* actions—a complete repeal of state-law prohibitions, followed by selective enactment of restrictions—that together would cause precisely the same result as the *impermissible* 2014 Act. *See* Pet. App. 32a. That simply cannot be the rule. *See* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 U.C.L.A. L. Rev. 74, 110–13 (2015) (explaining, in the context of analyzing preemption of state medical marijuana laws, that "the outcome of the federal preemption analysis . . . cannot turn upon whether a [S]tate first repeals all its marijuana laws and then subsequently enacts a regulatory scheme or jumps straight from prohibition to regulation").

In short, the questions raised by the Third Circuit's opinion are endless and the opinion provides no path to answering them. Would a law decriminalizing office pool wagering be permitted? How about a law decriminalizing sports wagering by individuals of any age, rather than just those over 21? Or a law decriminalizing the operation of sports pools at bars, law offices, restaurants, or judicial offices instead of casinos? The only way to discover which of these middle-ground options might pass muster is apparently through trial, error, and litigation. After all, the State closely followed the directions of the Third Circuit in passing the 2014 Act, only to see the governing law change in response. Such shifting, elusive targets make it nearly impossible for state elected officials to

enact reforms or repeal laws with confidence, and are a genuine threat to state sovereignty. *Cf. NFIB*, 132 S. Ct. at 2602 (States must "voluntarily and knowingly" accept limitations on federal funds "to ensur[e] that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system") (opinion of Roberts, C.J.); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) (to preserve state sovereignty, Congress must impose any conditions on spending "with a clear voice" to ensure that "the States [may] exercise their choice knowingly, cognizant of the consequences of their participation"); *Coleman* v. *Glynn*, 983 F.2d 737, 737 (6th Cir. 1993) (Merritt, J., concurring) (recognizing federalism concerns in Spending Clause cases and stating that "[u]nless federal statutes imposing spending obligations on the [S]tates are construed so as to resolve ambiguous language in favor of the [S]tates, [they] will be unable to plan, and adopt intelligently, budgets itemizing their spending obligations"). As Judge Vanaskie put it, that is an "untenable" situation for a sovereign entity, and one that merits review by this Court. Pet. App. 36a.

CONCLUSION

The Third Circuit's latest opinion validates Judge Vanaskie's fears, expressed in dissent just two years ago in *Christie I*, that the distinction between repeals and affirmative authorizations on which *Christie I* rested was illusory. Whereas *Christie I* held that the State was free to stop prohibiting sports wagering as long as it did not affirmatively sanction it, the *en banc Christie II* decision enjoins a repeal of state-law prohibitions and thereby requires the State to continue

prohibiting sports wagering. *See* Pet. App. 46a (stating that "the distinction between repeal and authorization is unworkable" and that "[t]oday's majority opinion validates my position: PASPA leaves the States with no choice"). This Court's review is essential to ensure that the anti-commandeering doctrine continues to serve its function of preserving our federalist system. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 7, 2016

APPENDIX

APPENDIX A

PRECEDENTIAL
AMENDED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-4546, 14-4568, and 14-4569

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission; NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC; NEW JERSEY SPORTS & EXPOSITION AUTHORITY

STEPHEN M. SWEENEY, President of the New Jersey Senate; VINCENT PRIETO, Speaker of the New Jersey General Assembly (Intervenors in District Court)

Appellants in 14-4568

Governor of New Jersey; David L. Rebuck; Frank Zanzuccki, Appellants in 14-4546

New Jersey Thoroughbred Horsemen's Association, Inc., Appellant in 14-4569

On Appeal from the United States District Court
for the District of New Jersey
(District Court No.: 3-14-cv-06450)
District Judge: Honorable Michael A. Shipp

Argued on March 17, 2015 before Merits Panel
Court Ordered Rehearing En Banc
on October 14, 2015
Argued En Banc on February 17, 2016

Before: AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY JR., VANASKIE, KRAUSE, RESTREPO, RENDELL, and BARRY, Circuit Judges

(Opinion filed: August 9, 2016)
(Amended: August 11, 2016)

* * *

OPINION

RENDELL, Circuit Judge:

The issue presented before the en banc court is whether SB 2460, which the New Jersey Legislature enacted in 2014 to partially repeal certain prohibitions on sports gambling (the "2014 Law"), violates federal law. 2014 N.J. Sess. Law Serv. Ch. 62, codified at N.J. Stat. Ann. §§ 5:12A-7 to -9. The District Court held that the 2014 Law violates the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §§ 3701-3704. A panel of this Court affirmed this ruling in a divided opinion which was subsequently vacated upon the grant of the Petition for Rehearing en banc. We now hold that the District Court correctly ruled that because PASPA, by its terms, prohibits states from authorizing by law sports gambling, and because the 2014 Law does exactly that, the 2014 Law violates federal law. We also hold that we correctly ruled in *Christie I* that PASPA does not commandeer the states in a way that runs afoul of the Constitution.

I. Background

Congress passed PASPA in 1992 to prohibit state-sanctioned sports gambling. PASPA provides:

> It shall be unlawful for—
>
> (1) a governmental entity to *sponsor, operate, advertise, promote, license, or authorize by law* or compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery,

> sweepstakes, or other betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702 (emphasis added). PASPA defines "governmental entity" to include states and their political subdivisions. *Id.* § 701(2). It includes a remedial provision that permits any sports league whose games are or will be the subject of sports gambling to bring an action to enjoin the gambling. *Id.* § 3703.

Congress included in PASPA exceptions for state-sponsored sports wagering in Nevada and sports lotteries in Oregon and Delaware, and also an exception for New Jersey but only if New Jersey were to enact a sports gambling scheme within one year of PASPA's enactment. *Id.* § 3704(a). New Jersey did not do so, and thus the PASPA exception expired. Notably, sports gambling was prohibited in New Jersey for many years by statute and by the New Jersey Constitution. *See, e.g.*, N.J. Const. Art. IV § VII ¶ 2; N.J. Stat. Ann. § 2C:37-2; N.J. Stat. Ann. § 2A:40-1. In 2010, however, the New Jersey Legislature held public hearings on the advisability of allowing sports gambling. These hearings included testimony that sports gambling would generate revenues for New Jersey's struggling casinos and racetracks. In 2011, the Legislature held a referendum asking New Jersey voters whether sports gambling should be permitted, and sixty-four percent voted in favor of amending the New Jersey Constitution to permit sports gambling. The constitutional amendment provided:

> It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place . . . .

N.J. Const. Art. IV, § VII, ¶ 2(D). The amendment thus permitted the New Jersey Legislature to "authorize by law" sports "wagering at casinos or gambling houses in Atlantic City," except that wagering was not permitted on New Jersey college teams or on any collegiate event occurring in New Jersey. An additional section of the amendment permitted the Legislature to "authorize by law" sports "wagering at current or former running and harness horse racetracks," subject to the same restrictions regarding New Jersey college teams and collegiate events occurring in New Jersey. *Id.* ¶ 2(F).

After voters approved the sports-wagering constitutional amendment, the New Jersey Legislature enacted the Sports Wagering Act in 2012 ("2012 Law"), which provided for regulated sports wagering at New Jersey's casinos and racetracks. N.J. Stat. Ann. §§ 5:12A-1 *et seq.* (2012). The 2012 Law established a comprehensive regulatory scheme, requiring licenses for operators and individual employees, extensive documentation, minimum cash reserves, and Division of Gaming Enforcement access to security and surveillance systems.

Five sports leagues[1] sued to enjoin the 2012 Law as violative of PASPA.[2] The New Jersey Parties did not dispute that the 2012 Law violated PASPA, but urged instead that PASPA was unconstitutional under the anti-commandeering doctrine. The District Court held that PASPA was constitutional and enjoined implementation of the 2012 Law. The New Jersey Parties appealed, and we affirmed in *National Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) (*Christie I*).

In *Christie I*, we rejected the New Jersey Parties' argument that PASPA was unconstitutional by commandeering New Jersey's legislative process. In doing so, we stated that "[n]othing in [PASPA's] words *requires* that the states keep any law in place. All that is prohibited is the issuance of gambling 'license[s]' or

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[1] The sports leagues were the National Collegiate Athletic Association, National Football League, National Basketball Association, National Hockey League, and the Office of the Commissioner of Baseball, doing business as Major League Baseball (collectively, the "Leagues").

[2] The Leagues named as defendants Christopher J. Christie, the Governor of the State of New Jersey; David L. Rebuck, the Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; and Frank Zanzuccki, Executive Director of the New Jersey Racing Commission. The New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA") intervened as a defendant, as did Stephen M. Sweeney, President of the New Jersey Senate, and Sheila Y. Oliver, Speaker of the New Jersey General Assembly ("State Legislators"). We collectively refer to these parties as the "New Jersey Parties." In the present case, the New Jersey Parties are the same, with some exceptions. NJTHA was named as a defendant (i.e., it did not intervene), as was the New Jersey Sports and Exposition Authority; the latter is not participating in this appeal. Additionally, Vincent Prieto, not Sheila Y. Oliver, is now the Speaker of the General Assembly.

the affirmative 'authoriz[ation] *by law*' of gambling schemes." *Id.* at 232 (alterations in original). The New Jersey Parties had urged that PASPA commandeered the state because it prohibited the repeal of New Jersey's prohibitions on sports gambling; they reasoned that repealing a statute barring an activity would be equivalent to authorizing the activity, and "authorizing" was not allowed by PASPA. We rejected that argument, observing that "PASPA speaks only of 'authorizing *by law*' a sports gambling scheme," and "[w]e [did] not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Id.* (emphasis in original). We further emphasized that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." *Id.* (emphasis in original). In short, we concluded that the New Jersey Parties' argument rested on a "false equivalence between repeal and authorization." *Id.* at 233. The New Jersey Parties appealed to the Supreme Court of the United States, which denied certiorari.

Undeterred, in 2014, the Legislature passed the 2014 Law, SB 2460, which provided in part:

> [A]ny rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be

> construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events . . . .

N.J. Stat. Ann. § 5:12A-7. The 2014 Law specifically prohibited wagering on New Jersey college teams' competitions and on any collegiate competition occurring in New Jersey, and it limited sports wagering to "persons 21 years of age or older situated at such location[s]," namely casinos and racetracks. *Id.*

II. Procedural History and Parties' Arguments

The Leagues filed suit to enjoin the New Jersey Parties from giving effect to the 2014 Law. The District Court held that the 2014 Law violates PASPA, granted summary judgment in favor of the Leagues, and issued a permanent injunction against the Governor of New Jersey, the Director of the New Jersey Division of Gaming Enforcement, and the Executive Director of the New Jersey Racing Commission (collectively, the "New Jersey Enjoined Parties").[3] The District Court interpreted *Christie I* as holding that

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[3] In the District Court, the New Jersey Enjoined Parties urged that the Eleventh Amendment gave them immunity such that they could not be sued in an action challenging the 2014 Law. The District Court rejected this argument, as do we, and we note that, while the issue was briefed, the New Jersey Enjoined Parties did not press—or even mention this issue at oral argument before either the merits panel or the en banc court. They contend that, because the 2014 Law is a self-executing repeal that requires no action from them or any other state official, they are immune from suit. This argument fails. The New Jersey En-

PASPA offers two choices to states: maintaining prohibitions on sports gambling or completely repealing them. It reasoned that the 2014 Law runs afoul of PASPA because the 2014 Law is a partial repeal that necessarily results in sports wagering with the State's imprimatur. The New Jersey Parties appealed.

On appeal, the New Jersey Parties argue that the 2014 Law does not constitute an authorization in vio-

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joined Parties are subject to suit under the *Ex parte Young* exception to Eleventh Amendment immunity, which "permit[s] the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)). The contrary argument of the New Jersey Enjoined Parties relies on a false premise that execution of the 2014 Law involves no affirmative *ultra vires* act by state officials. But the 2014 Law is far from passive. As we conclude at length, the 2014 Law establishes a regulatory regime that authorizes wagering on sports in limited locations for particular persons, so it is an affirmative act by New Jersey state officials to authorize by law sports betting, in violation of PASPA. As such, implementation of the law falls squarely within the *Ex parte Young* exception to sovereign immunity because it is "simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because" it is contrary to federal law. 209 U.S. at 159. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (internal quotation marks and alterations omitted). That is precisely the situation we face in this case. We therefore need not address the unsettled question of whether an *Ex parte Young* exception must exist in the case of a truly self-executing law because the 2014 Law is not one.

lation of PASPA and it is consistent with *Christie I* because the New Jersey Legislature effected a repealer as *Christie I* specifically permitted.

The Leagues urge that the 2014 Law violates PASPA because it "authorizes by law" sports wagering and also impermissibly "licenses" the activity by confining the repeal of gambling prohibitions to licensed gambling facilities and thus, in effect, enlarging the terms of existing gaming licenses. The United States submitted an amicus brief in support of the Leagues.

A panel of this Court affirmed in a divided opinion, which was subsequently vacated. Because we, sitting en banc, essentially agree with the reasoning of the panel majority's opinion, we incorporate much of it verbatim in this opinion.

III. Analysis[4]

A. The 2014 Law Violates PASPA

As a preliminary matter, we acknowledge the 2014 Law's salutary purpose in attempting to legalize sports gambling to revive its troubled casino and racetrack industries. The New Jersey Assembly Gaming and Tourism Committee chairman stated, in regard to the 2014 Law, that "[w]e want to give the racetracks a shot in the arm. We want to help Atlantic City. We want to do something for the gaming business in the state of New Jersey, which has been under tremen-

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[4] "We review a district court's grant of summary judgment *de novo* . . . ." *Viera v. Life Ins. Co. of N. Am.*, 642 F.3d 407, 413 (3d Cir. 2011). "We review a district court's grant of a permanent injunction for abuse of discretion." *Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 162 (3d Cir. 2011).

dous duress . . . ." (App. 91.) New Jersey State Senator Ray Lesniak, a sponsor of the law, has likewise stated that "[s]ports betting will be a lifeline to the casinos, putting people to work and generating economic activity in a growth industry." (App. 94.) And New Jersey State Senator Joseph Kyrillos stated that "New Jersey's continued prohibition on sports betting at our casinos and racetracks is contrary to our interest of supporting employers that provide tens of thousands of jobs and add billions to our state's economy" and that "[s]ports betting will help set New Jersey's wagering facilities apart from the competition and strengthen Monmouth Park and our struggling casino industry." (App. 138.) PASPA has clearly stymied New Jersey's attempts to revive its casinos and racetracks and provide jobs for its workforce.

Moreover, PASPA is not without its critics, even aside from its economic impact. It has been criticized for prohibiting an activity, i.e., sports gambling, that its critics view as neither immoral nor dangerous. It has also been criticized for encouraging the spread of illegal sports gambling and for making it easier to fix games, since it precludes the transparency that accompanies legal activities. Simply put, "[w]e are cognizant that certain questions related to this case—whether gambling on sporting events is harmful to the games' integrity and whether states should be permitted to license and profit from the activity—engender strong views." *Christie I*, 730 F.3d at 215. While PASPA's provisions and its reach are controversial (and, some might say, unwise), "we are not asked to judge the wisdom of PASPA" and "[i]t is not our place to usurp Congress' role simply because PASPA may have become an unpopular law." *Id.* at 215, 241. We

echo *Christie I* in noting that "New Jersey and any other state that may wish to legalize gambling on sports . . . are not left without redress. Just as PASPA once gave New Jersey preferential treatment in the context of gambling on sports, Congress may again choose to do so or . . . may choose to undo PASPA altogether." *Id.* at 240-41. Unless that happens, however, we are duty-bound to interpret the text of the law as Congress wrote it.

We now turn to the primary question before us: whether the 2014 Law violates PASPA. We hold that it does. Under PASPA, it shall be unlawful for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports gambling. 28 U.S.C. § 3702(1). We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.

First, the 2014 Law authorizes casinos and racetracks to operate sports gambling while other laws prohibit sports gambling by all other entities. Without the 2014 Law, the sports gambling prohibitions would apply to casinos and racetracks. Appellants urge that the 2014 Law does not provide authority for sports gambling because we previously held that "[t]he right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people" and that "[w]e do not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Christie I*, 730 F.3d at 232. But this is not a situation where there are *no* laws governing sports gambling in New Jersey. Absent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos

and racetracks. Thus, the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited.

Second, the 2014 Law authorizes sports gambling by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling. Under the 2014 Law, New Jersey's sports gambling prohibitions are specifically removed from casinos, gambling houses, and horse racetracks as long as the bettors are people age 21 or over, and as long as there are no bets on either New Jersey college teams or collegiate competitions occurring in New Jersey. The word "authorize" means, inter alia, "[t]o empower; to give a right or authority to act," or "[t]o permit a thing to be done in the future." Black's Law Dictionary 133 (6th ed. 1990).[5] The 2014 Law allows casinos and racetracks and their patrons to engage, under enumerated circumstances, in conduct that other businesses and their patrons cannot do. That selectiveness constitutes specific permission and empowerment.

Appellants urge that because the 2014 Law is only a "repeal" removing prohibitions against sports gambling, it is not an "affirmative authorization" under *Christie I*. To the extent that in *Christie I* we took the position that a repeal cannot constitute an authorization, we now reject that reasoning. Moreover, we do not adopt the District Court's view that the options available to a state are limited to two. Neither of these propositions were necessary to their respective

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[5] We cite the version of Black's Law Dictionary that was current in 1992, the year PASPA was passed.

rulings and were, in essence, dicta. Furthermore, our discussion of partial versus total repeals is similarly unnecessary to determining the 2014 Law's legality because the question presented here is straightforward—i.e., what does the law do—and does not turn on the way in which the state has enacted its directive.

The presence of the word "repeal" does not prevent us from examining what the provision actually does, and the Legislature's use of the term does not change that the 2014 Law selectively grants permission to certain entities to engage in sports gambling. New Jersey's sports gambling prohibitions remain, and no one may engage in such conduct except those singled out in the 2014 Law. While artfully couched in terms of a repealer, the 2014 Law essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling. This is an authorization.

Third, the exception in PASPA for New Jersey, which the State did not take advantage of before the one-year time limit expired, is remarkably similar to the 2014 Law. The exception states that PASPA does not apply to "a betting, gambling, or wagering scheme . . . conducted exclusively in casinos . . . , but only to the extent that . . . any commercial casino gaming scheme was in operation . . . throughout the 10-year period" before PASPA was enacted. 28 U.S.C. § 3704(a)(3)(B). The exception would have permitted sports gambling at New Jersey's casinos, which is just what the 2014 Law does. We can easily infer that, by explicitly excepting a scheme of sports gambling in New Jersey's casinos from PASPA's prohibitions, Congress intended that such a scheme would violate PASPA. If Congress had not perceived that sports

gambling in New Jersey's casinos would violate PASPA, then it would not have needed to insert the New Jersey exception. In other words, if sports gambling in New Jersey's casinos does not violate PASPA, then PASPA's one-year exception for New Jersey would have been superfluous. We will not read statutory provisions to be surplusage. *See Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). In order to avoid rendering the New Jersey exception surplusage, we must read the 2014 Law as authorizing a scheme that clearly violates PASPA.[6]

As support for their argument that the 2014 Law does not violate PASPA, Appellants cite the 2014 Law's construction provision, which provides that "[t]he provisions of this act . . . are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. N.J. Stat. Ann. § 5:12A-8. This conveniently mirrors PASPA's language providing that states may not "sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. 28 U.S.C. § 3702(1).

The construction provision does not save the 2014 Law. States may not use clever drafting or mandatory construction provisions to escape the supremacy of federal law. *Cf. Haywood v. Drown*, 556 U.S. 729, 742

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[6] Granted, the 2014 Law applies to horse racetracks as well as casinos, while the PASPA exception for New Jersey refers only to casinos, but that does not change the significance of the New Jersey exception because it refers to gambling in places that already allow gambling, and the racetracks fall within that rubric.

(2009) ("[T]he Supremacy Clause cannot be evaded by formalism."); *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 382-83 (1990) ("[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention of" a particular word). In the same vein, the New Jersey Legislature cannot use a targeted construction provision to limit the reach of PASPA or to dictate to a court a construction that would limit that reach. The 2014 Law violates PASPA, and the construction provision cannot alter that fact.

Appellants also draw a comparison between the 2014 Law and the 2012 Law, which involved a broad regulatory scheme, as evidence that the 2014 Law does not violate PASPA. It is true that the 2014 Law does not set forth a comprehensive scheme or provide for a state regulatory role, as the 2012 Law did. However, PASPA does not limit its reach to active state involvement or extensive regulation of sports gambling. It prohibits a range of state activity, the least intrusive of which is "authorization" by law of sports gambling.

We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.[7]

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[7] Because we conclude that the 2014 Law authorizes by law sports gambling, we need not address the argument made by Appellees and Amicus that the 2014 Law also licenses sports gambling by permitting only those entities that already have gambling licenses or recently had such licenses to conduct sports gambling operations. We also reject the argument of the State Legislators and the NJTHA that, to the extent that any aspect of the 2014 Law violates PASPA, we should apply the 2014 Law's severability clause. Citing the broadly-worded severability provision of N.J. Stat. Ann. § 5:12A-9, they argue that the District

B. PASPA Does Not Impermissibly Commandeer the States

Appellants expend significant effort in this appeal revisiting our conclusion in *Christie I* that PASPA does not unconstitutionally commandeer the states. They root this effort in the District Court's erroneous conclusion that PASPA presents states with a binary choice—either maintain a complete prohibition on

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Court should have saved the 2014 Law by severing the most objectionable parts. For example, the NJTHA urges that, "if the Court . . . concludes that a state decision to prohibit persons under 21 from making sports bets is [an] authorization by law for that activity by persons over 21, the age limitation could be severed, leaving it to the sports gambling operators . . . to impose a reasonable age limit." NJTHA's Reply Br. at 23. It also argues that, "if the Court concludes that a state decision to prohibit . . . sports betting on some games is [an] authorization by law as to betting on all other games, this limitation could be severed," and that "the Court can sever the Law's provision dealing with casinos from its provision dealing with racetracks." *Id.* at 24. Lifting the age limitation, permitting betting on New Jersey schools' games, or limiting the authorization to an even narrower category of venues, however, would not alter our conclusion that the 2014 Law authorizes by law sports betting. "The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks omitted). Because New Jersey's legislature, in both the 2012 Law and the 2014 Law, was loath to permit sports betting outside of gambling establishments, we cannot reasonably say that it would have enacted a repeal of its gambling laws without the age restriction, without the restriction on gambling on New Jersey-based college sports, and without the geographic restriction to casinos and racetracks. We thus need not speculate about other possible forms that severance might take.

sports wagering or wholly repeal state prohibitions. In *Christie I*, we engaged in a lengthy discussion to rebut Appellants' assertion that if we conclude that New Jersey's repeal of its prohibition is not permitted by PASPA, then it has unconstitutionally commandeered New Jersey. In so doing, we discussed the Supreme Court's clear case law on commandeering. Our prior conclusion that PASPA does not run afoul of anti-commandeering principles remains sound despite Appellants' attempt to call it into question using the 2014 Law as an exemplar.

1. *Anti-Commandeering Jurisprudence*

As we noted in *Christie I*, the Supreme Court's anti- commandeering principle rests on the conclusion that "Congress 'lacks the power directly to compel the States to require or prohibit' acts which Congress itself may require or prohibit." *Christie I*, 730 F.3d at 227 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)). In our prior survey of the anti-commandeering case law in *Christie I*, we grouped four commandeering cases upholding the federal laws at issue into two categories: (1) permissible regulation in a pre-emptible field, *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), and *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982); and (2) prohibitions on state action, *South Carolina v. Baker*, 485 U.S. 505 (1988) and *Reno v. Condon*, 528 U.S. 141 (2000). The Supreme Court has struck down federal laws on anti-commandeering grounds in only two cases, *New York v. United States* and *Printz v. United States*, 521 U.S. 898 (1997). We summarize our prior review below.

First, congressional action in passing laws in otherwise pre-emptible fields has withstood attack in cases where the states were not compelled to enact laws or implement federal statutes or regulatory programs themselves. In *Hodel*, the Supreme Court upheld the constitutionality of a law that imposed federal standards for coal mining. The law left states a choice. A state could "assume permanent regulatory authority over . . . surface coal mining operations" and "submit a proposed permanent program" that "demonstrate[s] that the state legislature has enacted laws implementing the environmental protection standards . . . and that the State has the administrative and technical ability to enforce the[] standards." *Hodel*, 452 U.S. at 271. However, if a state chose not to assume regulatory authority, the federal government would "administer[] the Act within that State and continue[] as such unless and until a 'state program' [wa]s approved." *Id.* at 272. As we described in *Christie I*:

> The Supreme Court upheld the provisions, noting that they neither compelled the states to adopt the federal standards, nor required them "to expend any state funds," nor coerced them into "participat[ing] in the federal regulatory program in any manner whatsoever." [*Hodel*, 452 U.S.] at 288. The Court further concluded that Congress could have chosen to completely preempt the field by simply assuming oversight of the regulations itself. *Id.* It thus held that the Tenth Amendment posed no obstacle to a system by which Congress "chose to allow the States a regulatory role." *Id.* at 290. As the Court later characterized

> *Hodel*, the scheme there did not violate the anti-commandeering principle because it "merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." *Printz v. United States*, 521 U.S. 898, 926 (1997).

Christie I, 730 F.3d at 227–28. The Supreme Court's opinion in *F.E.R.C. v. Mississippi* the following year confirmed its view that a law does not unconstitutionally commandeer the states when the law does not impose federal requirements on the states, but leaves states the choice to decline to implement federal standards. 456 U.S. 742, 767–68 (upholding a provision that required state utility companies to expend state resources to "consider" enacting federal standards, but did not require states to enact those standards).

Second, the Supreme Court has found Congress's prohibition of certain state actions to not constitute unconstitutional commandeering. In *South Carolina v. Baker*, the Court upheld federal laws that prohibited the issuance of bearer bonds, which required states to amend legislation to be in compliance. 485 U.S. at 511, 514 (1988). As we characterized this case in *Christie I*:

> The Court concluded this result did not run afoul [of] the Tenth Amendment because it did not seek to control or influence the manner in which States regulate private parties but was simply an inevitable consequence of regulating a state activity. In subsequent cases, the Court explained that the regulation in *Baker* was permissible because it simply subjected a

> State to the same legislation applicable to private parties.

Christie I, 730 F.3d at 228 (internal quotation marks and citations omitted). Later, in *Reno v. Condon*, the Court upheld the constitutionality of a law that prohibited states from releasing information gathered by state departments of motor vehicles. The Court ultimately concluded that the law at issue "d[id] not require the States in their sovereign capacity to regulate their own citizens[,] . . . d[id] not require the [State] Legislature[s] to enact any laws or regulations, and it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Reno*, 528 U.S. at 151 (as altered in *Christie I*, 730 F.3d at 228).

As noted above, the Supreme Court has invalidated laws on anti-commandeering grounds on only two occasions. In *New York*, the Supreme Court struck down a "take-title" provision whereby states were required to take title to radioactive waste by a specific date, at the waste generator's request, if they did not adopt a federal program. As we stated in *Christie I*, the provision "compel[led] the states to either enact a regulatory program, or expend resources in taking title to the waste." *Christie I*, 730 F.3d at 229. The Supreme Court ultimately concluded in *New York* that the take-title provision "crossed the line distinguishing encouragement from coercion." 505 U.S. at 175. Similarly in *Printz v. United States*, the Supreme Court concluded that Congress "may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program." 521 U.S. at 935 (finding a federal law requiring state

officers to conduct background checks on prospective gun owners to commandeer the states in violation of the Tenth Amendment).

2. *PASPA Does Not Violate Anti-Commandeering Principles*

We continue to view PASPA's prohibition as more akin to those laws upheld *in Hodel, F.E.R.C., Baker*, and *Reno*, and distinguishable from those struck down by the Supreme Court in *New York* and *Printz*. Our articulation of the way in which PASPA does not violate anti-commandeering principles warrants refinement, however, given the way in which the 2014 Law attempted to skirt PASPA and the thrust of Appellants' arguments in this appeal.

In an attempt to reopen the anti-commandeering question we previously decided, Appellants creatively rely on certain language that was used in *Christie I*. In pressing for a declaration that PASPA unconstitutionally commandeered the states in *Christie I*, Appellants characterized PASPA as requiring the states to affirmatively keep a prohibition against sports wagering on their books, lest they be found to have authorized sports gambling by law by repealing the prohibition. In response, we opined that Appellants' position "rest[ed] on a false equivalence between repeal and authorization," implying that a repeal is not an authorization. 730 F.3d at 233. Before us now Appellants urge that "[t]his Court held [in *Christie I*] that PASPA is constitutional *precisely because* it permits States to elect *not to prohibit* sports wagering, even if *affirmatively authorizing* it would be unlawful." Appellants' Br. 22 (emphasis in original). Appellants are saying, in effect, "We told you so"—if the legislature

cannot repeal New Jersey's prohibition as it attempted to do in the 2014 Law, then it is required to affirmatively keep the prohibition on the books, and PASPA unconstitutionally commandeers the states. We reject this argument.

That said, we view our discussion in *Christie I* regarding the relationship between a "repeal" and an "authorization" to have been too facile. While we considered whether repeal and authorization are interchangeable, our decision did not rest on that discussion. Today, we choose to excise that discussion from our prior opinion as unnecessary dicta. To be clear, a state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, "authorization" under PASPA. However, our determination that such a selective repeal of certain prohibitions amounts to authorization under PASPA does not mean that states are not afforded sufficient room under PASPA to craft their own policies.

Appellants urge that our conclusion in *Christie I* that PASPA does not unconstitutionally commandeer the states rested on our view that PASPA allows states to "choos[e] among many different potential policies on sports wagering that do not include licensing or affirmative authorization by the State." Appellants' Br. 29. This is correct. PASPA does not command states to take affirmative actions, and it does not present a coercive binary choice. Our reasoning in *Christie I* that PASPA does not commandeer the states remains unshaken.

Appellants characterize the 2014 Law as a lawful exercise in the space PASPA affords states to create their own policy. They argue that without options beyond a complete repeal or a complete ban on sports wagering, such as the partial repeal New Jersey pursued, PASPA runs afoul of anti- commandeering principles. This argument sweeps too broadly. That a specific partial repeal which New Jersey chose to pursue in its 2014 Law is not valid under PASPA does not preclude the possibility that other options may pass muster. The issue of the extent to which a given repeal would constitute an authorization, in a vacuum, is not before us, as it was not specifically before us in *Christie I*. However, as the Leagues noted at oral argument before the en banc court, not all partial repeals are created equal. For instance, a state's partial repeal of a sports wagering ban to allow *de minimis* wagers between friends and family would not have nearly the type of authorizing effect that we find in the 2014 Law. We need not, however, articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, if indeed such a line could be drawn. It is sufficient to conclude that the 2014 Law overstepped it.

Appellants seize on the District Court's erroneous interpretation of *Christie I*'s anti-commandeering analysis—namely, that PASPA presents states with a strict binary choice between total repeal and keeping a complete ban on their books—to once again urge that if PASPA commands such a choice, then it is comparable to the challenged law in *New York*. First, unlike the take-title provision included in the statute at issue in *New York*, PASPA's text does not present

states with a coercive choice to adopt a federal program. To interpret PASPA to require such a coercive choice is to read something into the statute that simply is not there.

Second, PASPA is further distinguishable from the law at issue in *New York* because it does not require states to take any action. In *New York*, the Supreme Court held that a federal law that required states to enact a federal regulatory program or take title to radioactive waste at the behest of generators "crossed the line distinguishing encouragement from coercion." 505 U.S. at 175. Unlike the law at issue in *New York*, PASPA includes no coercive direction by the federal government. As we previously concluded in *Christie I*, PASPA does not command states to take any affirmative steps:

> PASPA does not *require* or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law. They are not even required, like the states were in *F.E.R.C.*, to expend resources considering federal regulatory regimes, let alone to adopt them. Simply put, we discern in PASPA no directives requiring the States to address particular problems and no commands to the States' officers to administer or enforce a federal regulatory program.

730 F.3d at 231 (internal quotation marks and alterations omitted) (emphasis in original). Put simply, PASPA does not impose a coercive either-or requirement or affirmative command.

We will not allow Appellants to bootstrap already decided questions of PASPA's constitutionality onto our determination that the 2014 Law violates PASPA. We reject the notion that PASPA presents states with a coercive binary choice or affirmative command and conclude, as we did in *Christie I*, that it does not unconstitutionally commandeer the states.

IV. Conclusion

The 2014 Law violates PASPA because it authorizes by law sports gambling. We continue to find PASPA constitutional. We will affirm.

FUENTES *joined by* RESTREPO, Circuit Judges, dissenting:

In November 2011, the question of whether to allow sports betting in New Jersey went before the electorate. By a 2-1 margin, New Jersey voters passed a referendum to amend the New Jersey Constitution to allow the New Jersey Legislature to "authorize by law" sports betting.[1] Accordingly, the Legislature enacted the 2012 Sports Wagering Act ("2012 Law"). The Sports Leagues challenged this Law, claiming that it violated the Professional and Amateur Sports Protection Act's ("PASPA") prohibition on states "authoriz[ing] by law" sports betting.[2] In *Christie I*, we agreed with the Sports Leagues and held that the 2012 Law violated and thus was preempted by PASPA. We explained, however, that New Jersey was free to repeal the sports betting prohibitions it already had in place. We rejected the argument that a repeal of prohibitions on sports betting was equivalent to authorizing by law sports betting. When the matter was brought to the Supreme Court, the Solicitor General echoed that same sentiment, stating that, "PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part."[3]

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[1] N.J. Const. art. IV, § 7, ¶ 2(D).

[2] *See* 28 U.S.C. § 3702(1).

[3] Br. for the United States in Opp'n at 11, *Christie v. Nat'l Collegiate Athletic Ass'n*, Nos. 13-967, 13-979, and 13-980 (U.S. May 14, 2014).

So New Jersey did just that. In 2014, the New Jersey Legislature repealed certain sports betting prohibitions at casinos and gambling houses in Atlantic City and at horse racetracks in the State ("2014 Repeal"). In addition to repealing the 2012 Law in full, the 2014 Repeal stripped New Jersey of *any* involvement in sports betting, regulatory or otherwise. In essence, the 2014 Repeal rendered previous prohibitions on sports betting non-existent.

But the majority today concludes that the New Jersey Legislature's efforts to satisfy its constituents while adhering to our decision in *Christie I* are still in violation of PASPA. According to the majority, the "selective" nature of the 2014 Repeal *amounts to* "authorizing by law" a sports wagering scheme. That is, because the State retained certain restrictions on sports betting, the majority *infers* the authorization by law. I cannot agree with this interpretation of PASPA.

PASPA restricts the states in six ways – a state cannot "sponsor, operate, advertise, promote, license, or *authorize by law* or compact" sports betting.[4] The only one of these six restrictions that includes "by law" is "authorize." None of the other restrictions say anything about *how* the states are restricted. Thus, I believe that Congress gave this restriction a special meaning—that a state's "authoriz[ation] by law" of sports betting cannot merely be inferred, but rather requires a specific legislative enactment that affirmatively allows the people of the state to bet on sports. Any other interpretation would be reading the phrase "by law" out of the statute.

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[4] 28 U.S.C. § 3702(1) (emphasis added).

Indeed, we stated exactly this in *Christie I*—that all PASPA prohibits is "the affirmative 'authoriz[ation] *by law*' of gambling schemes."[5] Thus, we explained, nothing prevented New Jersey from repealing its sports betting prohibitions, since, "in reality, the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law."[6] As we noted, "that the Legislature needed to enact the [2012 Law] itself belies any contention that the mere repeal of New Jersey's ban on sports gambling was sufficient to 'authorize [it] by law.'"[7] The Legislature itself "saw a meaningful distinction between repealing the ban on sports wagering and authorizing it by law, undermining any contention that the amendment alone was sufficient to affirmatively authorize sports wagering—the [2012 Law] was required."[8] In short, we explained that there was a false equivalence between repeal and authorization.

With the 2014 Repeal, the New Jersey Legislature did what it thought it was permitted to do under our reading of PASPA in *Christie I*. The majority, however, maintains that the 2014 Repeal "authorizes" sports wagering at casinos, gambling houses, and horse racetracks simply because other sports betting

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[5] *Christie I*, 730 F.3d at 232 (alteration in original)

[6] *Id.*

[7] *Id.* (alteration in original).

[8] *Id.*

prohibitions remain in place.[9] According to the majority, "[a]bsent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks," and thus "the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited."[10] But I believe the majority is mistaken as to the impact of a partial repeal.

A repeal is defined as an "abrogation of an existing law by legislative act."[11] When a statute is repealed, "the repealed statute, in regard to its operative effect, is considered as if it had never existed."[12] If a repealed statute is treated as if it never existed, a partially repealed statute is treated as if the repealed sections never existed.[13] The 2014 Repeal, then, simply returns New Jersey to the state it was in before it first

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[9] I refer to the repeal of prohibitions as applying to casinos, gambling houses, and horse racetracks, with the understanding that the repeal applies to casinos and gambling houses in Atlantic City and horse racetracks in New Jersey for those over 21 not betting on New Jersey collegiate teams or any collegiate competition occurring in New Jersey.

[10] Maj. Op. 17.

[11] Black's Law Dictionary 1325 (8th ed. 2007).

[12] 73 Am. Jur. 2d Statutes § 264.

[13] *See, e.g.*, *Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("[W]hen an act of the legislature is repealed, it must be considered . . . as if it never existed."); *Anderson v. USAir, Inc.*, 818 F.2d 49, 55 (D.C. Cir. 1987) ("Common sense dictates that repeal means a deletion. This court would engage in pure speculation were it to hold otherwise."); *Kemp by Wright v. State, Cty. of Burlington*, 687 A.2d 715, 723 (N.J. 1997) ("In this State it is the general rule that where a statute is repealed and there is no saving[s] clause or a general statute limiting the effect of the re-

enacted those prohibitions on sports gambling. In other words, after the repeal, it is as if New Jersey *never* prohibited sports wagering at casinos, gambling houses, and horse racetracks. Therefore, with respect to those locations, there are no laws governing sports wagering. Contrary to the majority's position, the permission to engage in such an activity is not affirmatively granted *by virtue of* it being prohibited elsewhere.

To bolster its position, the majority rejects our reasoning in *Christie I*, stating that "[t]o the extent that in *Christie I* we took the position that a repeal cannot constitute an authorization, we now reject that reasoning."[14] I continue to maintain, however, that the 2014 Repeal *is not* an affirmative authorization by law. It is merely a repeal – it does not, and cannot, authorize by law anything.

In my view, the majority's position that the 2014 Repeal "selectively grants permission to certain entities to engage in sports gambling"[15] is simply incorrect. There is no explicit grant of permission in the 2014 Repeal for any person or entity to engage in sports gambling. Rather, the 2014 Repeal is a self-executing deregulatory measure that repeals existing prohibitions and regulations for sports betting and re-

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peal, the repealed statute, in regard to its operative effect, is considered as though it had never existed, except as to matters and transactions passed and closed.").

[14] Maj. Op. 18.

[15] *Id.*

quires the State to abdicate *any* control or involvement in sports betting.[16] The majority fails to explain why a partial repeal is equivalent to a grant of permission (by law) to engage in sports betting.

Suppose the State did exactly what the majority suggests it could have done: repeal completely its sports betting prohibitions. In that circumstance, sports betting could occur anywhere in the State and there would be no restrictions as to age, location, or whether a bettor could wager on games involving local teams. Would the State violate PASPA if it later enacted limited restrictions regarding age requirements and places where wagering could occur? Surely no conceivable reading of PASPA would preclude a state from *restricting* sports wagering in this scenario. Yet the 2014 Repeal comes to the same result.

The majority also fails to illustrate how the 2014 Repeal results in sports wagering *pursuant to state law* when there is effectively no law in place as to several locations, no scheme created, and no state involvement. A careful comparison with the 2012 Law is instructive. The 2012 Law lifted New Jersey's ban on sports wagering and created a licensing scheme for sports wagering pools at casinos and racetracks in the State. This comprehensive regime required close State supervision and regulation of those sports wagering pools. For instance, the 2012 Law required any entity that wished to operate a "sports pool lounge" to acquire a "sports pool license." To do so, a prospective

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[16] For example, under the 2014 Repeal, "[the Division of Gaming Enforcement ("DGE")] now considers sports wagering to be 'non-gambling activity' . . . that is beyond DGE's control and outside of DGE's regulatory authority." App. 416.

operator was required to pay a $50,000 application fee, secure Division of Gaming Enforcement ("DGE") approval of all internal controls, and ensure that any of its employees who were to be directly involved in sports wagering obtained individual licenses from the DGE and the Casino Control Commission ("CCC"). In addition, the betting regime required entities to, among other things, submit extensive documentation to the DGE, adopt new "house" rules subject to DGE approval, and conform to DGE standards. This, of course, violated PASPA in the most basic way: New Jersey developed an intricate scheme that both "authorize[d] *by law*" and "license[d]" sports gambling. The 2014 Repeal eliminated this entire scheme. Moreover, all state agencies with jurisdiction over state casinos and racetracks, such as the DGE and the CCC, were stripped of any sports betting oversight.

The majority likewise falters when it analogizes the 2014 Repeal to the exception Congress originally offered to New Jersey in 1992. The exception stated that PASPA did not apply to "a betting, gambling, or wagering scheme . . . conducted exclusively in casinos[,] . . . but only to the extent that . . . any commercial casino gaming scheme was in operation . . . throughout the 10-year period" before PASPA was enacted.[17] Setting aside the most obvious distinction between the 2014 Repeal and the 1992 exception—that it contemplated a *scheme* that the 2014 Repeal does not authorize—the majority misses the mark when it states: "If Congress had not perceived that sports gambling in New Jersey's casinos would violate PASPA, then it would not have needed to insert the

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[17] 28 U.S.C. § 3704(a)(3)(B).

New Jersey exception."[18] Congress did not, however, perceive, or intend for, private sports wagering in casinos to violate PASPA. Instead, Congress prohibited sports wagering undertaken pursuant to state law. That the 2014 Repeal might bring about an increase in the amount of private, legal sports wagering in New Jersey is of no moment, and the majority's reliance on such a possibility is misplaced. The majority is also wrong in a more fundamental way. The *exception* Congress offered to New Jersey was exactly that: an exception to the ordinary prohibitions of PASPA. That is to say, with this exception, New Jersey could have "sponsor[ed], operate[d], advertise[d], promote[d], license[d], or authorize[d] by law or compact" sports wagering. Under the 2014 Repeal, of course, New Jersey cannot and does not aim to do any of these things.

Because I do not see how a partial repeal of prohibitions is tantamount to authorizing by law a sports wagering scheme in violation of PASPA, I respectfully dissent.

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[18] Maj. Op. 19.

VANASKIE, Circuit Judge, dissenting.

While Congress "has the authority under the Constitution to pass laws requiring or prohibiting certain acts, *it lacks the power directly to compel the States to require or prohibit those acts.*" *New York v. United States*, 505 U.S. 144, 166 (1992) (emphasis added). Concluding that the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et seq.*, was a congressional command that States must prohibit wagering on sporting events because it forbids the States from "authoriz[ing] by law" such activity, I dissented from the holding in *Christie I* that PASPA was a valid exercise of congressional authority. *National Collegiate Athletic Ass'n v. Governor of New Jersey (Christie I)*, 730 F.3d 208, 241–51 (3d Cir. 2013) (Vanaskie, J., dissenting). My colleagues in the majority in *Christie I* disagreed with my conclusion because they believed that States had the option of repealing existing bans on sports betting. *Id.* at 232. In upholding PASPA, *Christie I* rejected New Jersey's argument that a repeal of its ban on sports betting would be viewed as effectively "authoriz[ing] by law" this activity. *Christie I* declared that New Jersey's "attempt to read into PASPA a requirement that the states must affirmatively keep a ban on sports gambling in their books rests on a false equivalence between repeal and authorization." *Id.* at 233. I viewed that "false equivalence" assertion with considerable skepticism. *Id.* at 247 n. 5 ("[I]t certainly is open to debate whether a state's repeal of a ban on sports gambling would be akin to that state's 'authorizing' gambling on sporting events . . . ."). My skepticism is validated by today's majority opinion. The majority

dodges the inevitable conclusion that PASPA conscripts the States to prohibit wagering on sports by suggesting that some partial repeal of the ban on sports gambling would not be tantamount to authorization of gambling.

Implicit in today's majority opinion and *Christie I* is the premise that Congress lacks the authority to decree that States must prohibit sports wagering, and so both majorities find some undefined room for States to enact partial repeals of existing bans on sports gambling. While the author of *Christie I* finds that New Jersey's partial repeal at issue here is not the equivalent of authorizing by law wagering on sporting events, today's majority concludes otherwise. This shifting line approach to a State's exercise of its sovereign authority is untenable. The bedrock principle of federalism that Congress may not compel the States to require or prohibit certain activities cannot be evaded by the false assertion that PASPA affords the States some undefined options when it comes to sports wagering. Because I believe that PASPA was intended to compel the States to prohibit wagering on sporting events, it cannot survive constitutional scrutiny. Accordingly, as I did in *Christie I*, I dissent.

I.

According to the majority, "a state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization' under PASPA." Maj. Op., at 28. The majority also claims "a state's partial repeal of a sports wagering ban to allow *de minimis* wagers between friends and family would not have nearly the type of

authorizing effect that we find in the 2014 Law." *Id.* at 29. Thus, according to the majority, the 2014 Law is a partial repeal that is foreclosed by PASPA, but "other options may pass muster" because "not all partial repeals are created equal." *Id.*

Noticeably, the majority does not explain why all partial repeals are not created equal or explain what distinguishes the 2014 Law from those partial repeals that pass muster. To further complicate matters, the majority continues to rely on *Christie I*, which did "not read PASPA to prohibit New Jersey from repealing its ban on sports wagering" and informed New Jersey that "[n]othing in [PASPA's] words *requires* that the states keep any law in place." 730 F.3d at 232.

A.

Christie I "[r]ecogniz[ed] the importance of the affirmative/negative command distinction," and "agree[d] with [New Jersey] that the affirmative act requirement, if not properly applied, may permit Congress to 'accomplish exactly what the commandeering doctrine prohibits' by stopping the states from 'repealing an existing law.'" 730 F.3d at 232 (quoting *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring)). *Christie I*, however, discounted concerns regarding PASPA's affirmative act requirement because *Christie I* "d[id] not read PASPA to prohibit New Jersey from repealing its ban on sports wagering." *Id.* According to *Christie I*, PASPA is constitutional because "[n]othing in [PASPA's] words *requires* that the states keep any law in place." *Id.* This conclusion formed the premise for the conclusion in *Christie I* that PASPA passed constitutional muster.

Remarkably, the majority chooses to "excise that discussion from our prior opinion as unnecessary dicta." Maj. Op., at 28. This cannot be the case, however, because that discussion was the cornerstone of the holding in *Christie I*. *See In re McDonald*, 205 F.3d 606, 612 (3d Cir. 2000) ("Chief Judge Posner has aptly defined dictum as 'a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it.'" (quoting *Sarnoff v. Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986))).

Indeed, to rationalize its conclusion in *Christie I*, the *Christie I* majority had to expressly reject the notion that when a state "choose[s] to repeal an affirmative prohibition of sports gambling, that is the same as 'authorizing' that activity, and therefore PASPA precludes repealing prohibitions on gambling just as it bars affirmatively licensing it." 730 F.3d at 232. This aspect of *Christie I* was not peripheral to the ultimate holding because *Christie I* specifically "agree[d] with [New Jersey] that the affirmative act requirement, if not properly applied, may permit Congress to 'accomplish exactly what the commandeering doctrine prohibits' by stopping the states from 'repealing an existing law.'" *Id.* (quoting *Conant*, 309 F.3d at 646 (Kozinski, J., concurring)). Thus, to resolve the issue before it, *Christie I* necessarily had to give this issue the "full and careful consideration of the court." *In re McDonald*, 205 F.3d at 612 (quoting *Sarnoff*, 798 F.2d at 1084).

In giving the issue its full and careful consideration, *Christie I* explained that the notion that a "repeal" could be the same as an "authorization" was "problematic in numerous respects." 730 F.3d at 232; *see also id.* ("Most basically, it ignores that PASPA speaks only of 'authorizing by law' a sports gambling scheme."). *Christie I* did "not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Id.* *Christie I* recognized a distinction between affirmative commands for actions and prohibitions, and explained that there was "a false equivalence between repeal and authorization." *Id.* at 233. Thus, as a matter of statutory construction, and to avoid "a series of constitutional problems," *Christie I* specifically held that if the Court did not distinguish between "repeals" (affirmative commands) and "authorizations" (affirmative prohibitions), the Court would "read[] the term 'by law' out of [PASPA]." *Id.* at 233.

I dissented from that opinion because "any distinction between a federal directive that commands states to take affirmative action and one that prohibits states from exercising their sovereignty is illusory." 730 F.3d at 245 (Vanaskie, J., concurring in part and dissenting in part). The decision to base *Christie I* on a distinction between affirmative commands for action and affirmative prohibitions was "untenable," because "affirmative commands to engage in certain conduct can be rephrased as a prohibition against not engaging in that conduct." *Id.* As I explained, basing *Christie I* on such an illusory distinction raises constitutional concerns because "[a]n interpretation of federalism principles that permits

congressional negative commands to state governments will eviscerate the constitutional lines drawn" by the Supreme Court. *Id.*

B.

After *Christie I*, a state like New Jersey *at least* had the choice to either "repeal its sports wagering ban," or, "[o]n the other hand . . . keep a complete ban on sports gambling." *Id.* at 233 (majority opinion). The *Christie I* majority found that this choice was not too coercive because it left "much room for the states to make their own policy" and left it to a State "to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be." *Id.*

Today's majority makes it clear that PASPA does not leave a State "much room" at all. Indeed, it is evident that States must leave gambling prohibitions on the books to regulate their citizens. A review of the four Supreme Court anti-commandeering cases referenced by the majority is illuminating.

1.

The first two anti-commandeering cases that the majority reviews are *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), and *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982). As the majority points out, these cases address "permissible regulation in a pre-emptible field." Maj. Op., at 23. In analyzing these cases, however, the majority overlooks the main rule announced by the Supreme Court in situations where there is an exercise of legislative authority under the Commerce Clause or where Congress preempts an area with federal legislation within its legislative power. In such situations, States

have a choice: they may either comply with the federal legislation *or the Federal Government will carry the legislation into effect.*

This rule was announced in *Hodel*, where the Supreme Court explained that "[i]f a State does not wish to . . . compl[y] with the Act and implementing regulations, *the full regulatory burden will be borne by the Federal Government.*" 452 U.S. at 288 (emphasis added). The same theme repeated itself in *F.E.R.C.*, as the Supreme Court focused on "*the choice put to the States*—that of either abandoning regulation of the field altogether or considering the federal standards." 456 U.S. at 766 (emphasis added). In both cases, the Supreme Court was clear that there must be some choice for the states to make because without it "the accountability of both state and federal officials is diminished." *New York v. United States*, 505 U.S. 144, 168 (1992).

Indeed, in *New York v. United States*, the Court explained that a State's view on legislation "can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case . . . it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* at 168. The Supreme Court reiterated this point *Printz v. United States*, explaining that, "[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." 521 U.S. 898, 930 (1997). Thus, States must be given a choice because the Supreme Court is concerned that "it may be state officials who will bear the brunt of

public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*, 505 U.S. at 169.

As the majority explains, while "PASPA's provisions and its reach are controversial (and, some might say, unwise) . . . . we are duty-bound to interpret the text of the law as Congress wrote it." Maj. Op., at 16. Because the majority has excised the distinction between a repeal and an authorization, the majority makes it clear that under PASPA as written, no repeal of any kind will evade the command that no State "shall . . . authorize by law" sports gambling. 28 U.S.C. § 3702. In the face of such a congressional directive, "no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz*, 521 U.S. at 935.

2.

This leads to the other two anti-commandeering cases reviewed by the majority: *South Carolina v. Baker*, 485 U.S. 505 (1988), and *Reno v. Condon*, 528 U.S. 141 (2000). The majority explains that these cases address permissible "prohibitions on state action." Maj. Op., at 23. Again, however, the majority seems to overlook the animating factor for each of these opinions. In both *Baker* and *Reno* the Supreme Court explained that permissible prohibitions regulated *State activities*. The Supreme Court has never sanctioned statutes or regulations that sought to control or influence *the manner in which States regulate private parties*.

For example, in *Baker*, the Supreme Court reviewed a challenge to the Internal Revenue Code's enactment of § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, which prohibited States from issuing unregistered bearer bonds. Notably, when reviewing the case, the Court specifically found that it did not need to address "the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests" because the Court found that the commandeering concerns "in *FERC* [were] inapplicable to § 310." *Baker*, 485 U.S. at 513. Importantly, the Court distinguished § 310 from the statute in *F.E.R.C.* because the Court found that "Section 310 regulates state activities; it does not, as did the statute in *FERC*, seek to control or influence the manner in which States regulate private parties." *Id.* at 514. Similarly, in *Reno*, the Court addressed a statute that did not require (1) "the States in their sovereign capacity to regulate their own citizens," (2) "the . . . Legislature to enact any laws or regulations," or (3) "state officials to assist in the enforcement of federal statutes regulating private individuals." 528 U.S. at 151. It was only on these bases that the Supreme Court found the statute at issue in Reno was "consistent with the constitutional principles enunciated in *New York* and *Printz*." *Id.*

Unlike the statutes at issue in Baker and Reno, however, PASPA seeks to control and influence the *manner* in which States regulate private parties. Through PASPA, Congress unambiguously commands that "[i]t shall be unlawful for . . . a governmental entity to . . . authorize by law" sports gambling. 28 U.S.C. § 3702. By issuing this command,

Congress has set an impermissible "mandatory agenda to be considered in all events by state legislative or administrative decisionmakers." *F.E.R.C.*, 45 U.S. at 769.

3.

The logical extension of the majority is that PASPA prevents States from passing *any* laws to repeal existing gambling laws. As the majority correctly notes, "[t]he word 'authorize' means, inter alia, '[t]o empower; to give a right or authority to act,' or '[t]o permit a thing to be done in the future.'" Maj. Op., at 17 (quoting Black's Law Dictionary 133 (6th Ed. 1990)) (footnote omitted). Because authorization includes permitting a thing to be done, it follows that PASPA also prevents state officials from stopping enforcement of existing gambling laws. States *must* regulate conduct prioritized by Congress. *Cf. Conant*, 309 F.3d at 646 (Kozinski, J., concurring) ("[P]reventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated.").

It is true that civil actions to enjoin a violation of PASPA "may be commenced in an appropriate district court of the United States by the Attorney General of the United States." 28 U.S.C. § 3703. But it can hardly be said that the United States Attorney General bears the full regulatory burden because, through

PASPA, Congress effectively commands the States to maintain and enforce existing gambling prohibitions.[1]

PASPA is a statute that directs States to maintain gambling laws by dictating the manner in which States must enforce a federal law. The Supreme Court has never considered Congress' legislative power to be so expansive. *See Prigg v. Com. of Pennsylvania*, 41 U.S. 539, 541 (1842) ("It might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the constitution"); *F.E.R.C.*, 456 U.S. at 761–62 ("[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations ") (citing *E.P.A. v. Brown*, 431 U.S. 99 (1977)); *New York*, 505 U.S. at 178 ("Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S Ct. 2566, 2602 (2012) (plurality opinion) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." (quoting *New York*, 505 U.S. at 162)).

II.

It is now apparent that *Christie I* was incorrect in finding that "*nothing* in [PASPA's] words *requires* that the states keep *any* law in place." 730 F.3d at 232

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[1] A refusal to enforce existing laws would be the same as a repeal of existing laws: the States would be authorizing sports wagering.

(first and third emphasis added). With respect to the doctrinal anchors of *Christie I*, the cornerstone of its holding has been eroded by the majority, which has excised *Christie I*'s discussion regarding "a false equivalence between repeal and an authorization." *Id.* at 233. Notably, that discussion was included in *Christie I* to avoid "a series of constitutional problems." *Id.* Today's majority makes it clear that passing a law so that there is no law in place governing sports wagering is the same as authorizing it by law. *See* Maj. Op., at 17 ("The word 'authorize' means, inter alia, '[t]o empower; to give a right or authority to act,' or '[t]o permit a thing to be done in the future.'") (citation and footnote omitted).

I dissented in *Christie I* because the distinction between repeal and authorization is unworkable. Today's majority opinion validates my position: PASPA leaves the States with no choice. While *Christie I* at least gave the States the option of repealing, in whole or *in part*, existing bans on gambling on sporting events, today's decision tells the States that they must maintain an anti-sports wagering scheme. The anti-commandeering doctrine, essential to protect State sovereignty, prohibits Congress from compelling States to prohibit such private activity. Accordingly, I dissent.

APPENDIX B

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-4546, 14-4568, and 14-4569

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission; NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC; NEW JERSEY SPORTS & EXPOSITION AUTHORITY

On Appeal from the United States District Court for the District of New Jersey
(District Court No.: 3-14-cv-06450)
District Judge: Honorable Michael A. Shipp

Before: AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY JR., VANASKIE, KRAUSE, RESTREPO, RENDELL, and BARRY, Circuit Judges

ORDER AMENDING OPINION

The opinion issued on August 9, 2016 is hereby amended as the Honorable L. Felipe Restrepo joined in the dissenting opinion filed by the Honorable Julio M. Fuentes.

A revised opinion will be entered on the docket reflecting this change. This amendment does not affect the original filing date of the judgment.

For the Court,

s/ _____

Marcia M. Waldron, Clerk
Date: August 11, 2016
tmm/cc: all counsel of record

APPENDIX C

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-4546, 14-4568, and 14-4569

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission; NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; NEW JERSEY SPORT & EXPOSITION AUTHORITY

STEPHEN M. SWEENEY, President of the New Jersey Senate; VINCENT PRIETO, Speaker of the New Jersey General Assembly (Intervenors in District Court),

Appellants in 14-4568

Governor of New Jersey; David L. Rebuck; Frank Zanzuccki,

Appellants in 14-4546

New Jersey Thoroughbred Horsemen's Association, Inc.,

Appellant in 14-4569

On Appeal from the United States District Court
for the District of New Jersey
(District Court No.: 3-14-cv-06450)
District Judge: Honorable Michael A. Shipp

Argued on March 17, 2015

Before: RENDELL, FUENTES and BARRY, Circuit Judges (Opinion filed: August 25, 2015)

* * *

(Opinion filed: August 9, 2016)
(Amended: August 11, 2016)

OPINION

RENDELL, Circuit Judge:

The issue presented in this appeal is whether SB 2460, which the New Jersey Legislature enacted in 2014 (the "2014 Law") to partially repeal certain

prohibitions on sports gambling, violates federal law. 2014 N.J. Sess. Law Serv. Ch. 62, codified at N.J. Stat. Ann. §§ 5:12A-7 to -9. The District Court held that the 2014 Law violates the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §§ 3701-3704. We will affirm. PASPA, by its terms, prohibits states from authorizing by law sports gambling, and the 2014 Law does exactly that.

I. Background

Congress passed PASPA in 1992 to prohibit state-sanctioned sports gambling. PASPA provides:

> It shall be unlawful for—
>
> (1) a governmental entity to *sponsor, operate, advertise, promote, license, or authorize by law* or compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702 (emphasis added). PASPA defines "governmental entity" to include states and their political subdivisions. 28 U.S.C. § 3701(2). PASPA includes a remedial provision that permits any sports league whose games are or will be the subject of sports gambling to bring an action to enjoin the gambling. 28 U.S.C. § 3703.

Congress included in PASPA exceptions for state-sponsored sports wagering in Nevada and sports lotteries in Oregon and Delaware, and also an exception for New Jersey but only if New Jersey were to enact a sports gambling scheme within one year of PASPA's enactment. 28 U.S.C. § 3704(a). New Jersey did not do so and, thus, the PASPA exception expired. Notably, sports gambling was prohibited in New Jersey for many years by statute and by the New Jersey Constitution. *See, e.g.*, N.J. Const. Art. IV § VII ¶ 2; N.J. Stat. Ann. § 2C:37-2; N.J. Stat. Ann. § 2A:40-1. In 2010, however, the New Jersey Legislature held public hearings on the advisability of allowing sports gambling. These hearings included testimony that sports gambling would generate revenues for New Jersey's struggling casinos and racetracks. In 2011, the Legislature held a referendum asking New Jersey voters whether sports gambling should be permitted, and sixty-four percent voted in favor of amending the New Jersey Constitution to permit sports gambling. The constitutional amendment provided:

> It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place . . . .

N.J. Const. Art. IV, § VII, ¶ 2(D). The amendment thus permitted the New Jersey Legislature to "au-

thorize by law" sports wagering at "casinos or gambling houses in Atlantic City," except that wagering was not permitted on New Jersey college teams or on any collegiate event occurring in New Jersey. An additional section of the amendment permitted the Legislature to "authorize by law" sports wagering at "current or former running and harness horse racetracks," subject to the same restrictions regarding New Jersey college teams and collegiate events occurring in New Jersey. N.J. Const. Art. IV, § VII, ¶ 2(F).

After voters approved the sports-wagering constitutional amendment, the New Jersey Legislature enacted the Sports Wagering Act in 2012 ("2012 Law"), which provided for regulated sports wagering at New Jersey's casinos and racetracks. N.J. Stat. Ann. §§ 5:12A-1 *et seq.* (2012). The 2012 Law established a comprehensive regulatory scheme, requiring licenses for operators and individual employees, extensive documentation, minimum cash reserves, and Division of Gaming Enforcement access to security and surveillance systems.

Five sports leagues[1] sued to enjoin the 2012 Law as violative of PASPA.[2] The New Jersey Parties did

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[1] The sports leagues were the National Collegiate Athletic Association ("NCAA"), National Football League ("NFL"), National Basketball Association, National Hockey League, and the Office of the Commissioner of Baseball, doing business as Major League Baseball (collectively, the "Leagues").

[2] The Leagues named as defendants Christopher J. Christie, the Governor of the State of New Jersey; David L. Rebuck, the Director of the New Jersey Division of Gaming Enforcement ("DGE") and Assistant Attorney General of the State of New Jersey; and Frank Zanzuccki, Executive Director of the New Jersey Racing Commission ("NJRC"). The New Jersey Thoroughbred

not dispute that the 2012 Law violated PASPA, but urged, instead, that PASPA was unconstitutional under the anti-commandeering doctrine. The District Court held that PASPA was constitutional and enjoined implementation of the 2012 Law. The New Jersey Parties appealed, and we affirmed in *National Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) (*Christie I*).

Christie I rejected the New Jersey Parties' argument that PASPA was unconstitutional. In explaining that PASPA does not commandeer the states' legislative processes, we stated: "[n]othing in [PASPA's] words *requires* that the states keep any law in place. All that is prohibited is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] *by law*' of gambling schemes." *Id.* at 232 (alterations in original). The New Jersey Parties had urged that PASPA commandeered the state because it prohibited the repeal of New Jersey's prohibitions on sports gambling; they reasoned that repealing a statute barring an activity would be equivalent to authorizing the activity, and "authorizing" was not allowed by PASPA. We rejected that argument, observing that "PASPA speaks only of 'authorizing *by law*' a sports gambling scheme," and "[w]e [did] not see how having *no law* in

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Horsemen's Association, Inc. ("NJTHA") intervened as a defendant, as did Stephen M. Sweeney, President of the New Jersey Senate, and Sheila Y. Oliver, Speaker of the New Jersey General Assembly ("State Legislators"). We collectively refer to these parties as the "New Jersey Parties." In the present case, the New Jersey Parties are the same, with some exceptions. NJTHA was named as a defendant (i.e., it did not intervene), as was the New Jersey Sports and Exposition Authority; the latter is not participating in this appeal. Additionally, Vincent Prieto, not Sheila Y. Oliver, is now the Speaker of the General Assembly.

place governing sports wagering is the same as authorizing it by law." *Id.* We further emphasized that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." *Id.* In short, we concluded that the New Jersey Parties' argument rested on a "false equivalence between repeal and authorization." *Id.* at 233.

The New Jersey Parties appealed to the United States Supreme Court, which denied certiorari. *Christie I* is now the law of the Circuit: PASPA is constitutional and does not violate the anti-commandeering doctrine.

Undeterred, in 2014, the Legislature passed the 2014 Law, SB 2460, which provided in part:

> any rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events . . . .

N.J. Stat. Ann. § 5:12A-7. The 2014 Law specifically prohibited wagering on New Jersey college teams' competitions and on any collegiate competition occurring in New Jersey, and it limited sports wagering to "persons 21 years of age or older situated at such location[s]," namely casinos and racetracks. *Id.*

II. Procedural History and Parties' Arguments

The Leagues filed suit to enjoin the New Jersey Parties from giving effect to the 2014 Law. The District Court held that the 2014 Law violates PASPA, granted summary judgment in favor of the Leagues and issued a permanent injunction against the Governor of New Jersey, the Director of the New Jersey Division of Gaming Enforcement, and the Executive Director of the New Jersey Racing Commission (collectively, the "New Jersey Enjoined Parties").[3] The District Court interpreted *Christie I* as holding that

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[3] In the District Court, the New Jersey Enjoined Parties urged that the Eleventh Amendment gave them immunity such that they could not be sued in an action challenging the 2014 Law. The District Court rejected this argument, as do we, and we note that, while the issue was briefed, the New Jersey Enjoined Parties did not press—or even mention—this issue at oral argument. They contend that, because the 2014 Law is a self-executing repeal that requires no action from them or any other state official, they are immune from suit. This argument fails. The New Jersey Enjoined Parties are subject to suit under the *Ex parte Young* exception to Eleventh Amendment immunity, which "permit[s] the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)). The New Jersey Enjoined Parties are not arguing that other state officials should have been named instead of them; they are arguing that *no* state official can be sued regarding the 2014 Law. We disagree. The Leagues named the state officials who are most

PASPA offers two choices to states: maintaining prohibitions on sports gambling or completely repealing them. It reasoned that PASPA preempts the 2014 Law because the 2014 Law is a partial repeal that necessarily results in sports wagering with the State's imprimatur. The New Jersey Parties appealed.

On appeal, the New Jersey Parties argue that the 2014 Law complies with PASPA and is consistent with *Christie I* because the New Jersey Legislature effected a repealer as *Christie I* specifically permitted. The NJTHA argues that the District Court erred in granting injunctive relief to the Leagues because the Leagues have unclean hands from supporting sports gambling in other contexts, and that any injunctive relief should be limited to the Leagues' games and should not include games of entities who are not parties to this action.

The Leagues urge that the 2014 Law violates PASPA because it "authorizes" and "licenses" sports gambling. The United States submitted an amicus brief in support of the Leagues arguing that the 2014 Law impermissibly "licenses" sports wagering by confining the repeal of gambling prohibitions to licensed

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closely connected to the 2014 Law, i.e., the Governor, the Director of the DGE, and the Executive Director of the NJRC. The Leagues did not name officials who bear no connection whatsoever to the 2014 Law. *See Young*, 209 U.S. at 156 (explaining that plaintiffs cannot name just any state official, such as a "state superintendent of schools" simply "to test the constitutionality" of a law). *See also Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988) (noting that a suit against the governor would be appropriate when challenging a "self-enforcing statute" because "[t]he plaintiff would have been barred from challenging the statute by the eleventh amendment unless it could name the Governor as a defendant").

gambling facilities and thus, in effect, enlarging the terms of existing gaming licenses.

We conclude that the District Court did not err in striking down the 2014 Law.

III. Analysis[4]

A. The 2014 Law Violates PASPA

As a preliminary matter, we acknowledge New Jersey's salutary purpose in attempting to legalize sports gambling to revive its troubled casino and racetrack industries. The New Jersey Assembly Gaming and Tourism Committee chairman stated, in regards to the 2014 Law, that "[w]e want to give the racetracks a shot in the arm. We want to help Atlantic City. We want to do something for the gaming business in the state of New Jersey, which has been under tremendous duress . . . ." (App. 91.) New Jersey State Senator Ray Lesniak, a sponsor of the law, has likewise stated that "[s]ports betting will be a lifeline to the casinos, putting people to work and generating economic activity in a growth industry." (App. 94.) And New Jersey State Senator Joseph Kyrillos stated that "New Jersey's continued prohibition on sports betting at our casinos and racetracks is contrary to our interest of supporting employers that provide tens of thousands of jobs and add billions to our state's economy" and that "[s]ports betting will help set New Jersey's wagering facilities apart from the competition and strengthen Monmouth Park and our struggling casino

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[4] "We review a district court's grant of summary judgment *de novo* . . . ." *Viera v. Life Ins. Co. of N. Am.*, 642 F.3d 407, 413 (3d Cir. 2011). "We review a district court's grant of a permanent injunction for abuse of discretion." *Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 162 (3d Cir. 2011).

industry." (App. 138.) PASPA has clearly stymied New Jersey's attempts to revive its casinos and racetracks and provide jobs for its workforce.

Moreover, PASPA is not without its critics, even aside from its economic impact. It has been criticized for prohibiting an activity, i.e., sports gambling, that its critics view as neither immoral nor dangerous. It has also been criticized for encouraging the spread of illegal sports gambling and for making it easier to fix games, since it precludes the transparency that accompanies legal activities.[5] Simply put, "[w]e are cognizant that certain questions related to this case—whether gambling on sporting events is harmful to the games' integrity and whether states should be permitted to license and profit from the activity—engender strong views." *Christie I*, 730 F.3d at 215. While PASPA's provisions and its reach are controversial and, some might say, unwise, "we are not asked to judge the wisdom of PASPA" and "[i]t is not our place to usurp Congress' role simply because PASPA may have become an unpopular law." *Id.* at 215, 241. We echo *Christie I* in noting that "New Jersey and any other state that may wish to legalize gambling on sports . . . are not left without redress. Just as PASPA once gave New Jersey preferential treatment in the context of gambling on sports, Congress may again

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[5] It has also been criticized as unconstitutional, but we held otherwise in *Christie I* and we cannot and will not revisit that determination here. *See Christie I*, 730 F.3d at 240 ("[N]othing in PASPA violates the U.S. Constitution. The law neither exceeds Congress' enumerated powers nor violates any principle of federalism implicit in the Tenth Amendment or anywhere else in our Constitutional structure.").

choose to do so or . . . may choose to undo PASPA altogether." *Id.* at 240-41. Unless or until that happens, however, we are duty-bound to interpret the text of the law as Congress wrote it.

We now turn to the primary question before us: whether the 2014 Law violates PASPA. We hold that it does. Under PASPA, it shall be unlawful for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports gambling. 28 U.S.C. § 3702(1). We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.

First, the 2014 Law authorizes casinos and racetracks to operate sports gambling while other laws prohibit sports gambling by all other entities. Without the 2014 Law, the sports gambling prohibitions would apply to casinos and racetracks. Appellants urge that the 2014 Law does not provide authority for sports gambling because we previously held that "[t]he right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people" and that "[w]e do not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Christie I*, 730 F.3d at 232. But this is not a situation where there are *no* laws governing sports gambling in New Jersey. Absent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks. Thus, the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited.

Second, the 2014 Law authorizes sports gambling by selectively dictating where sports gambling may

occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling. Under the 2014 Law, New Jersey's sports gambling prohibitions are specifically removed from casinos, gambling houses, and horse racetracks as long as the bettors are people age 21 or over, and as long as there are no bets on either New Jersey college teams or collegiate competitions occurring in New Jersey. The word "authorize" means, inter alia, "[t]o empower; to give a right or authority to act," or "[t]o permit a thing to be done in the future." Black's Law Dictionary 133 (6th ed. 1990).[6] The 2014 Law allows casinos and racetracks and their patrons to engage, under enumerated circumstances, in conduct that other businesses and their patrons cannot do. That selectiveness constitutes specific permission and empowerment.

Appellants place much stock in our statement in *Christie I* that their argument there rested on a "false equivalence between repeal and authorization." 730 F.3d at 233. They claim that the 2014 Law does not authorize sports gambling because it is only a "repeal" and, in *Christie I*, we stated that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law." *Id.* at 232. In other words, they argue that, because the 2014 Law is only a repeal removing prohibitions against sports gambling, it is not an "affirmative authorization" under *Christie I*. We agree that, had the 2014 Law repealed all prohibitions on sports gambling, we would be hard-pressed, given *Christie I*, to find an "authorizing by law" in violation of PASPA. But that is not

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[6] We cite the version of Black's Law Dictionary that was in effect in 1992, the year PASPA was passed.

what occurred here. The presence of the word "repeal" does not prevent us from examining what the provision actually does, and the Legislature's use of the term does not change the fact that the 2014 Law selectively grants permission to certain entities to engage in sports gambling. New Jersey's sports gambling prohibitions remain and no one may engage in such conduct save those listed by the 2014 Law. While artfully couched in terms of a repealer, the 2014 Law essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling. This is not a repeal; it is an authorization.

Third, the exception in PASPA for New Jersey, which New Jersey did not take advantage of before the one-year time limit expired, is remarkably similar to the 2014 Law. The exception states that PASPA does not apply to "a betting, gambling, or wagering scheme . . . conducted exclusively in casinos . . . , but only to the extent that . . . any commercial casino gaming scheme was in operation . . . throughout the 10-year period" before PASPA was enacted. 28 U.S.C. § 3704(a)(3)(B). The exception would have permitted sports gambling at New Jersey's casinos, which is just what the 2014 Law does. We can easily infer that, by explicitly excepting a scheme of sports gambling in New Jersey's casinos from PASPA's prohibitions, Congress intended that such a scheme would violate PASPA. If Congress had not perceived that sports gambling in New Jersey's casinos would violate PASPA, then it would not have needed to insert the New Jersey exception. In other words, if sports gambling in New Jersey's casinos does not violate PASPA, then PASPA's one-year exception for New Jersey

would have been superfluous. We will not read statutory provisions to be surplusage. *See Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). In order to avoid rendering the New Jersey exception surplusage, we must read the 2014 Law as authorizing a scheme that clearly violates PASPA.[7]

As support for their argument that the 2014 Law does not violate PASPA, Appellants cite the 2014 Law's construction provision, which provides that "[t]he provisions of this act . . . are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. N.J. Stat. Ann. § 5:12A-8. This conveniently mirrors PASPA's language providing that states may not "sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. 28 U.S.C. § 3702(1).

The construction provision does not save the 2014 Law. States may not use clever drafting or mandatory construction provisions to escape the supremacy of federal law. *Cf. Haywood v. Drown*, 556 U.S. 729, 742 (2009) ("[T]he Supremacy Clause cannot be evaded by formalism."); *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 382-83 (1990) ("[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention of" a particular word). In the same vein, the

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[7] Granted, the 2014 Law applies to horse racetracks as well as casinos, while the PASPA exception for New Jersey refers only to casinos, but that does not change the significance of the New Jersey exception because it refers to gambling in places that already allow gambling, and the racetracks fall within that rubric.

New Jersey Legislature cannot use a targeted construction provision to limit the reach of PASPA or to dictate to a court a construction that would limit that reach. The 2014 Law violates PASPA, and the construction provision cannot alter that fact.

Appellants also draw a comparison between the 2014 Law and the 2012 Law, which involved a broad regulatory scheme, as evidence that the 2014 Law does not violate PASPA. It is true that the 2014 Law does not set forth a comprehensive scheme or provide for a state regulatory role, as the 2012 Law did. However, PASPA does not limit its reach to active state involvement or regulation of sports gambling. It prohibits a range of state activity, the least intrusive of which is "authorization" by law of sports gambling.

We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.[8]

B. Injunctive Relief

The NJTHA argues that the injunction should apply only to the parties who brought this suit and that gambling on the athletic contests of other entities, who are not parties to this suit, should be permitted.

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[8] Because we conclude that the 2014 Law authorizes by law sports gambling, we need not address the argument made by Appellees and Amicus that the 2014 Law also licenses sports gambling by permitting only those entities that already have gambling licenses or recently had such licenses to conduct sports gambling operations. We also do not address the argument of the State Legislators and the NJTHA that, to the extent that any aspect of the 2014 Law violates PASPA, we should apply the 2014 Law's severability clause. The State Legislators and the NJTHA offer no proposals regarding what provisions should be severed from the 2014 Law, and we do not see how we could sever it.

But PASPA does not limit its prohibition to sports gambling involving only entities who actually bring suit. PASPA provides that "[a] civil action to enjoin a violation of section 3702 . . . may be commenced . . . by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation." 28 U.S.C. § 3703. The NJTHA conflates the Leagues' right to bring suit with the remedy they may obtain. PASPA provides that the Leagues may "enjoin a violation of section 3702," without any limiting language. The 2014 Law violates PASPA in all contexts, not simply as applied to the Leagues, and, therefore, the District Court properly enjoined its application in full.

Finally, we need not dwell on the NJTHA's argument that the Leagues should not be entitled to equitable relief because they have unclean hands. The NJTHA contends that the Leagues are essentially hypocrites because they encourage and profit from sports betting, noting that the NFL has been scheduling games in London where sports gambling is legal, that the NCAA holds events in Las Vegas where sports gambling is legal, and that the Leagues sanction and encourage fantasy sports betting. These allegations fail to rise to the level required for application of the unclean hands doctrine. "The equitable doctrine of unclean hands applies when a party seeking relief has committed an unconscionable act immediately related to the equity the party seeks in respect to the litigation." *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 174 (3d Cir. 2001). It is not "unconscionable" for the Leagues to support fantasy sports and hold events in Las Vegas or London, nor is doing so "immediately related" to the 2014 Law. We

cannot conclude that the Leagues acted unconscionably, i.e., amorally, abusively, or with extreme unfairness, in relation to the 2014 Law.

IV. Conclusion

The 2014 Law violates PASPA because it authorizes by law sports gambling. We will affirm.

FUENTES, Circuit Judge, dissenting.

In response to *Christie I*, where we held that New Jersey's 2012 Sports Wagering Law ("2012 Law") violated PASPA, the New Jersey Legislature passed the 2014 Law. In addition to repealing the 2012 Law in full, the 2014 Law also repealed all prohibitions on sports wagering and any rules authorizing the State to, among other things, license or authorize a person to engage in sports wagering, with respect to casinos and gambling houses in Atlantic City and horse racetracks in New Jersey. The repealer also maintained prohibitions for persons under 21 and for wagering on New Jersey collegiate teams or any collegiate competition occurring in New Jersey. Likewise, the 2014 Law stripped New Jersey of *any* involvement in sports wagering, regulatory or otherwise. In essence, the 2014 Law renders previous prohibitions on sports gambling non-existent.

The majority, however, takes issue with what it terms the "selective" nature of the partial repeal. First, that the repeal applies to specific locations. That is, under the 2014 Law, wagering may only take place at casinos, gambling houses, and horse racetracks. Next, the restriction against betting by persons under the age of 21 would remain, and finally, restrictions against betting on New Jersey collegiate teams or any collegiate competition in New Jersey would remain. These restrictions, the majority concludes, amount to "authorizing" a sports-wagering scheme and, therefore, the 2014 Law must also violate PASPA. I disagree. As I see it, the issue is whether a partial repeal amounts to authorization. Because this

logic rests on the same false equivalence[1] we rejected in *Christie I*, I respectfully dissent.

The majority, however, maintains that the 2014 Law "authorizes" casinos and racetracks to operate sports gambling while other laws prohibit sports gambling by all other entities.[2] According to the majority, "this is not a situation where there are *no* laws governing sports gambling in New Jersey" and "[a]bsent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks."[3] Yet, the majority is mistaken as to the impact of a partial repeal. Repeal is defined as to "rescind" or "an abrogation of an existing law by legislative act."[4] When a statute is repealed, "the repealed statute, in regard to its operative effect, is considered as if it had never existed."[5] A repealed statute is

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[1] A false equivalence is a logical fallacy which describes a situation where there is a logical and apparent equivalence, but when in fact there is none. This fallacy is categorized as a fallacy of inconsistency. Harry Phillips & Patricia Bostian, *The Purposeful Argument: A Practical Guide, Brief Edition* 129 (2014). In *Christie I*, we held that there was a false equivalence between repeal and authorization. 730 F.3d at 233.

[2] For brevity, I refer to the repeal of prohibitions as applying to casinos, gambling houses, and horse racetracks, with the understanding that the repeal applies to casinos and gambling houses in Atlantic City and horse racetracks in New Jersey for those over 21 not betting on New Jersey collegiate teams or any collegiate competition occurring in New Jersey.

[3] Maj. Op. 16-17.

[4] Black's Law Dictionary 1325 (8th ed. 2007).

[5] 73 Am. Jur. 2d Statutes § 264.

treated as if it never existed; a partially repealed statute is treated as if only the remaining part exists.[6]

The 2014 Law, then, renders the previous prohibitions on sports gambling non-existent. After the repeal, it is as if New Jersey never prohibited sports gambling in casinos, gambling houses, and horse racetracks. Therefore, with respect to those areas, there are no laws governing sports wagering and the right to engage in such conduct does not come from the state. Rather, the right to do that which is not prohibited stems from the inherent rights of the people.[7] The majority, however, states that "[a]bsent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks," and that, as such, "the 2014 Law provides the author-

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[6] *See, e.g., Ex Parte McCardle*, 74 U.S. 506, 514 (1868) ("[W]hen an act of the legislature is repealed, it must be considered . . . as if it never existed." (internal quotation marks omitted)); *Anderson v. USAir, Inc.*, 818 F.2d 49, 55 (D.C. Cir. 1987) ("Common sense dictates that repeal means a deletion. This court would engage in pure speculation were it to hold otherwise."); *In re Black*, 225 B.R. 610, 620 (Bankr. M.D. La. 1998) ("Can a statute use a repealed statute? Is a repealed statute something or is it nothing? We think the answers are 'no' and 'nothing.'"); *Kemp by Wright v. State*, 687 A.2d 715, 723 (N.J. 1997) ("In this State it is the general rule that where a statute is repealed and there is no saving[s] clause or a general statute limiting the effect of the repeal, the repealed statute . . . is considered as though it had never existed, except as to matters and transactions passed and closed." (quoting *Parsippany Hills Assocs. v. Rent Leveling Bd. of Parsippany-Troy Hills Twp.*, 476 A.2d 271, 275 (N.J. Super. 1984)).

[7] *Christie I*, 730 F.3d at 232.

ization for conduct that is otherwise clearly and completely legally prohibited."[8] We have refuted this position before. In *Christie I*, we held that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law."[9] Such an argument, we said, "rests on a false equivalence between repeal and authorization and reads the term 'by law' out of the statute."[10] We identified several problems in making this false equivalence—the most troublesome being that it "reads the term 'by law' out of the statute."[11] The majority's position does just that. In holding that a partial repeal of prohibitions is state authorization, the majority must infer authorization. PASPA, however, contemplates more. In *Christie I*, we pointed to the fact that New Jersey's 2012 amendment to its constitution, which gave the Legislature power to "authorize by law" sports wagering was insufficient to "authorize [it] by law."[12] We explained, "that the Legislature needed to enact the [2012 Law] itself belies any contention that the mere repeal of New Jersey's ban on sports gambling was sufficient to 'authorize [it] by law' . . . . [T]he . . . Legislature itself saw a meaningful distinction between repealing the ban on sports wagering and authorizing it by law, undermining any contention that the amendment alone was sufficient to affirmatively authorize sports wagering."[13] This is no less true of a partial repeal than it

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[8] Maj. Op. 16-17.

[9] *Christie I*, 730 F.3d at 232.

[10] *Id.* at 233.

[11] *Id.*

[12] *Id.* at 232.

[13] *Id.*

would be of a total repeal—which the majority concedes would not violate PASPA. Thus, to reach the conclusion that the 2014 Law, a partial repeal of prohibitions, authorizes sports wagering, the majority necessarily relies on this false equivalence. It concedes as much when stating "the 2014 Law" (the repeal) provides "the authorization" for sports wagering. Of course, this is the exact false equivalence we identified, and dismissed as a logical fallacy, in *Christie I*.[14]

The majority does not believe it makes this false equivalence. To support its position, the majority relies on the "selective" nature of the 2014 Law contending that "the Legislature's use of the term ['repeal'] does not change the fact that the 2014 Law selectively grants permission to certain entities to engage in sports gambling."[15] First, it does not. There is no explicit grant of permission in the 2014 Law for *any* entity to engage in sports wagering. Second, not only does the majority fail to explain why such a partial repeal is equivalent to granting permission (by law) for these locations, but the very logic of such a position fails. If withdrawing prohibitions on "some" sports wagering is the equivalent to authorization by law, then withdrawing prohibitions on *all* sports wagering must be considered authorization by law.[16] Under

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[14] *Id.* at 233.

[15] Maj. Op. 18.

[16] Put another way, would a state violate PASPA if it enacted a complete repeal of sports-wagering prohibitions and later enacted limited prohibitions regarding age requirements and places where wagering could occur? There is simply no conceivable reading of PASPA that could preclude a state from restricting sports wagering.

this logic, New Jersey is left with no choice at all—it must uphold all prohibitions on sports wagering in perpetuity or until PASPA is no more. This is precisely the opposite of what we held in *Christie I*—"[n]othing in these words *requires* that the states keep any law in place"[17]—and why we found PASPA did not violate the anti-commandeering principle.

The majority, along with the United States, conceded that a complete repeal does not violate PASPA. Indeed, in its brief in opposition to New Jersey's petition for certiorari, the United States went as far as to concede that New Jersey could repeal its prohibitions in whole or in part.[18] Simply put, there is nothing special about a partial repeal and it, too, does not violate PASPA. The 2014 Law is a self-executing deregulatory measure that repeals existing prohibitions and regulations for sports wagering and requires the State to abdicate *any* control or involvement in sports wagering. I do not see, then, how the majority concludes that the 2014 Law authorizes sports wagering, much less in violation of PASPA.

The majority equally falters when it analogizes the 2014 Law to the exception Congress originally offered to New Jersey in 1992. The exception stated that PASPA did not apply to "a betting, gambling, or wagering scheme . . . conducted exclusively in casinos[,] . . . but only to the extent that . . . any commercial casino gaming scheme was in operation . . .

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[17] 730 F.3d at 232.

[18] Br. for the United States in Opp'n at 11, *Christie v. Nat'l Collegiate Athletic Ass'n*, Nos. 13-967, 13-979, and 13980 (U.S. May 14, 2014).

throughout the 10-year period" before PASPA was enacted.[19] Setting aside the most obvious distinction between the 2014 Law and the 1992 exception, that it contemplated a *scheme* that the 2014 Law does not authorize,[20] the majority misses the mark with this comparison when it states: "If Congress had not perceived that sports gambling in New Jersey's casinos would violate PASPA, then it would not have needed to insert the New Jersey exception."[21] Congress, however, did not perceive, or intend, for private sports wagering in casinos to violate PASPA. Instead, Congress prohibited sports wagering pursuant to state law. That the 2014 Law might bring about an increase in the amount of private, legal sports wagering in New Jersey is of no moment and the majority's reliance on such a possibility is misplaced. The majority is also wrong in an even more fundamental way: the exception Congress offered to New Jersey was exactly that, an exception to the proscriptions of PASPA. That is to say, with this exception, New Jersey could have "sponsor[ed], operate[d], advertise[d], promote[d], li-

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[19] 28 U.S.C. § 3704(a)(3)(B).

[20] For example, "[Division of Gaming Enforcement ("DGE")] now considers sports wagering to be 'non-gambling activity' . . . that is beyond DGE's control and outside of DGE's regulatory authority." App. 416. At oral argument, Appellants conceded they would have no authority or jurisdiction over sports wagering. *See, e.g.*, Tr. 14:12-15 ("Q: Sports betting is going to take place in the casino with no oversight whatsoever; A: That's right."); Tr. 21:15-20 ("All of the state and federal laws that deal with consumer protection, criminal penalties and the like remain in full force and effect at the sports betting venue. The only thing that doesn't get regulated is the sports betting itself.").

[21] Maj. Op. 19.

cense[d], or authorize[d] by law or compact" sports wagering. Under the 2014 Law, of course, New Jersey cannot and does not aim to do any of these things.

The majority fails to illustrate how the 2014 Law results in sports wagering *pursuant to state* law when there is no law in place as to several locations, no scheme created, and no state involvement. A careful comparison to the 2012 Law is instructive. The 2012 Law lifted New Jersey's ban on sports wagering and provided for the licensing of sports-wagering pools at casinos and racetracks in the State. Indeed, New Jersey set up a comprehensive regime for the licensing and close supervision and regulation of sports-wagering pools. For instance, the 2012 Law required any entity that wished to operate a "sports pool lounge" to acquire a "sports pool license." To do so, a prospective operator was required to pay a $50,000 application fee, secure DGE approval of all internal controls, and ensure that any of its employees who were to be directly involved in sports wagering obtained individual licenses from DGE and the Casino Control Commission. In addition, the regime required entities to, among other things, submit extensive documentation to DGE, to adopt new "house" rules subject to DGE approval, and to conform to DGE standards. This violated PASPA in the most basic way: New Jersey developed an intricate scheme to both authorize (*by law*) and license sports gambling. The 2014 Law repealed this entire scheme.

Without more, the majority is simply left calling a tail a leg—which, as the adage goes, does not make it so. Because I do not see how a partial repeal of prohibitions is tantamount to "authorizing by law" a sports-

wagering scheme in violation of PASPA, I respectfully dissent.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, s, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	Civil Action No. 14-6450 (MAS) (LHG)
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, s, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	Civil Action No. 12-4947 (MAS) (LHG) **OPINION**

SHIPP, District Judge

This matter comes before the Court on application for a preliminary injunction by Plaintiffs National Collegiate Athletic Association ("NCAA"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"),

and Office of the Commissioner of Baseball, doing business as Major League Baseball ("MLB"), (collectively "Plaintiffs" or the "Leagues") to enjoin Christopher J. Christie, Governor of the State of New Jersey; David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; Frank Zanzuccki, Executive Director of the New Jersey Racing Commission ("State Defendants"); the New Jersey Sports and Exposition Authority ("NJSEA"); and New Jersey Thoroughbred Horsemen's Association ("NJTHA") (collectively "Defendants").[1] (ECF No. 12; 12-4947, ECF No. 174.)[2] On November 10, 2014, the Court notified the parties of its intent to consolidate the Leagues' application for a preliminary injunction with a final disposition on the merits. (ECF No. 50; 12-4947, ECF No. 192.) The Court conducted oral argument on November 20, 2014. The Court, having considered the parties' submissions and arguments, and for the reasons stated below, finds that the Leagues are entitled to summary judgment on Count One of the Complaint and a concomitant permanent injunction.

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[1] On November 6, 2014, the Presiding Officers of the New Jersey Legislature, Stephen M. Sweeney, President of the New Jersey Senate, and Vincent Prieto, Speaker of the New Jersey General Assembly ("Legislature Defendants"), requested leave to intervene (ECF No. 46), which was granted on November 7, 2014 (ECF No. 48).

[2] Unless otherwise noted, citations to the docket refer to Civil Action No. 14-6450.

I. Introduction

Sports betting continues to be an issue of great importance to New Jersey. In 2011, the people of New Jersey passed a referendum, approving a constitutional amendment that authorized sports gambling in the state at casinos and racetracks. Subsequently, New Jersey enacted legislation in 2012 that legalized and regulated sports gambling at New Jersey racetracks and casinos for individuals age twenty-one and older, with the exception of wagering on college sporting events that take place in New Jersey or on New Jersey college teams (the "2012 Law"). The Leagues then sued, and the Defendants challenged the constitutionality of the Professional and Amateur Sports Protection Act ("PASPA"). The State Defendants, the Legislature Defendants, and the NJTHA vigorously litigated the issue before the Undersigned and the Third Circuit Court of Appeals. Both courts found PASPA constitutional, and the United States Supreme Court declined certiorari. On October 17, 2014, the State enacted legislation repealing the 2012 Law and other provisions of state law related to gaming insofar as they bar sports wagering in certain contexts (the "2014 Law"). Defendants assert that the 2014 Law results in legal sports gambling at New Jersey racetracks and casinos for individuals age twenty-one and older, with the exception of wagering on college sporting events that take place in New Jersey or on New Jersey college teams. This case requires the Court to determine whether New Jersey's recent attempt to do indirectly what it could not do directly—bring sports wagering to New Jersey in a limited fashion—conflicts with PASPA.

It is a well-known principle that "the rule of law is sacrosanct, binding on all Americans." (Leagues' TRO Br., Decl. of Anthony J. Dreyer ("Dreyer Decl."), Ex. 8, Governor Christie's Statement Vetoing S. 2250, ECF No. 12-11.) The Supremacy Clause makes the Constitution and the laws passed pursuant to it the supreme law of the land and provides the mechanism to enforce uniform national policies. When state law contradicts with federal law, the Supremacy Clause operates to preclude states from following policies different than those set forth by federal law. As the Third Circuit noted in *Christie I*, to allow states to follow policies contrary to federal law would be "revolutionary," reducing the Constitution to the same impotent condition that existed under the Articles of Confederation. *See Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208, 230 (3d Cir. 2013), *cert. denied sub nom., Christie v. Nat'l Collegiate Athletic Ass'n*, 134 S. Ct. 2866 (2014) ("*Christie I*").

New Jersey's current desire to allow sports wagering within its borders is not unique to the State. While New Jersey is at the forefront of this movement, many states around the country appear poised to join should New Jersey provide a roadmap around PASPA. New Jersey's most recent legislation does not provide such a roadmap. While novel, the recent legislation still conflicts with PASPA and thus must yield to the federal law. As a result, to the extent the people of New Jersey disagree with PASPA, their remedy is to repeal the state's prohibition consistent with the Third Circuit's directive or work towards a repeal or amendment of PASPA in Congress. "Ignoring federal law, rather than working to reform federal standards,

is counter to our democratic traditions and inconsistent with . . . Constitutional values." (Leagues' TRO Br., Dreyer Decl., Ex. 8, Governor Christie's Statement Vetoing S. 2250, ECF No. 12-11.)

II. Background

A. The Professional and Amateur Sports Protection Act

Congress enacted PASPA, 28 U.S.C. §§ 3701-3704, in 1992 "to 'prohibit sports gambling conducted by, or authorized under the law of, any State or governmental entity' and to 'stop the spread of State-sponsored sports gambling.'" *Christie I*, 730 F.3d at 216 (quoting S. Rep. 102-248, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555). To that end, PASPA makes it unlawful for:

> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
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> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
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> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702. PASPA includes a grandfather clause, which exempts states with preexisting sports wagering laws. *Id.* § 3704. Additionally, PASPA

granted New Jersey a one-year window to legalize wagering on sports, but New Jersey chose not to exercise that option. *Christie I*, 730 F.3d at 216 (citing § 3704). At the time Congress enacted PASPA, "*all but one* state prohibited broad state-sponsored gambling," but states, including New Jersey, were beginning to consider different laws that would allow sports wagering in their states. *Id.* at 234; *see also* S. Rep. 102-248, at 5. PASPA's legislative history makes clear that Congress enacted PASPA to "keep sports gambling from spreading" pursuant to a state scheme. S. Rep. 102-248, at 5.

B. *Christie I*: The 2012 Law

Roughly twenty years after the enactment of PASPA, New Jersey sought to adopt legalized sports wagering within its borders. In 2010, the New Jersey Legislature held public hearings regarding sports wagering and ultimately asked New Jersey voters to consider an amendment to the State's Constitution,[3] to

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[3] The official ballot question read: "Shall the amendment to Article IV, Section VII, paragraph 2 of the Constitution of the State of New Jersey, agreed to by the Legislature, providing that it shall be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City and at racetracks, in-person or through an account wagering system, on the results of professional, certain college, or amateur sport or athletic events, be approved?" *See* S. Con. Res. 49, 214th Leg. (N.J. 2010). The interpretative statement that appeared in conjunction with the ballot question stated: "This constitutional amendment would authorize the Legislature to pass laws allowing sports wagering at Atlantic City casinos and at racetracks. Wagers could be placed on professional, certain college, or amateur sport or athletic events. However, wagers could not be placed on college games that take place in New Jersey or in which a New Jersey college team participates regardless of where the game takes place. A wager could be placed at a casino or racetrack either in-

make it "lawful for the Legislature to authorize by law wagering . . . on the results of any professional, college, or amateur sport or athletic event." N.J. Const. art. IV, § 7, ¶ 2(D), (F). In the November 2011 general election, New Jersey voters approved the referendum, and the constitutional amendment became effective on December 8, 2011. On January 17, 2012, pursuant to this constitutional amendment, New Jersey enacted the 2012 Law, N.J. Stat. Ann. §§ 5:12A-1 to -4, -5 to -6 (2012). In response to the enactment of the 2012 Law, on August 7, 2012, the Leagues filed a complaint against the State Defendants claiming that the 2012 Law violated PASPA.[4] (12-4947, ECF No. 1.)

On February 28, 2013, after careful consideration of the positions advanced during the course of the litigation, this Court found that "Congress acted within its power and [PASPA] does not violate the United States Constitution," and entered a permanent injunction. *Christie I*, 926 F. Supp. 2d 551, 554 (D.N.J. 2013). On September 17, 2013, the Third Circuit, in a *de novo* review, affirmed this Court's decision. The Third Circuit held that: (1) the Leagues had standing to bring the action; (2) PASPA's enactment was within Congress's power under the Commerce Clause; (3) PASPA did not violate the anti-commandeering

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person or from any other location through an account wagering system that uses telephone, Internet or other means." *Id.*

[4] On November 21, 2012, the Legislature Defendants and the NJTHA filed Motions to Intervene (12-4947, ECF Nos. 72, 75), which were granted on December 11, 2012 (12-4947, ECF No. 102). On January 22, 2013, the United States filed a Notice of Intervention in response to the Court's Order Certifying Notice of a Constitutional Challenge to the United States Attorney General. (12-4947, ECF Nos. 128.)

principle; and (4) PASPA was not invalid under the doctrine of equal sovereignty. *See Christie I*, 730 F.3d at 215. On June 23, 2014, the United States Supreme Court denied certiorari. *See Christie I*, 134 S. Ct. 2866 (2014).

On the same day the Supreme Court denied Defendants' certiorari petition, legislation was introduced in the New Jersey Senate "[p]artially repealing prohibitions against sports wagering at racetracks and casinos in New Jersey." S. 2250, 216th Leg. (N.J. 2014) (vetoed). Three days later, the Senate and the Assembly both passed the legislation without any recorded debate or discussion. *Id.* On August 8, 2014, Governor Christie vetoed the legislation. Governor Christie said the legislation was "a novel attempt to circumvent the Third Circuit's ruling" in *Christie I*. (Leagues' TRO Br., Dreyer Decl., Ex. 8, Governor Christie's Statement Vetoing S. 2250, ECF No. 12-11.) Governor Christie stated that, while he did "not agree with the Circuit Court's conclusion, [he] believe[s] that the rule of law is sacrosanct, binding on all Americans." (*Id.*) Governor Christie acknowledged: "[i]gnoring federal law, rather than working to reform federal standards, is counter to our democratic traditions and inconsistent with the Constitutional values I have sworn to defend and protect." (*Id.*)

One month later, on September 8, 2014, New Jersey's Acting Attorney General issued a Law Enforcement Directive to all New Jersey law enforcement personnel regarding the 2012 Law. The Directive concluded that, based on the severability clause in the statute, the central provisions of the 2012 Law, which establish that casinos or racetracks may operate

sports pools, remained in effect, and thus, such activity was exempted from criminal and civil liability. (State Defs.' Clarification Mot. 1-2, 12-4947, ECF No. 161.) On the same day, the State Defendants filed a motion in *Christie I* requesting that the Court clarify its permanent injunction or modify its injunction to conform to this interpretation of the Third Circuit's decision. (*Id.* at 8-9.) In connection with this request, the State Defendants secured a moratorium on sports wagering in New Jersey from all casinos and racetracks until October 26, 2014. (Oct. 9, 2014 Ltr., Ex. A, 12-4947, ECF No. 168.) On October 17, 2014, the State Defendants withdrew their motion for clarification or modification and notified the Court that Governor Christie signed New Jersey Senate Bill 2460 into law. (Oct. 17, 2014 Ltr., 12-4947, ECF No. 173.)

C. *Christie II*: The 2014 Law

The 2014 Law was first introduced in the Senate on October 9, 2014. S. 2460, 216th Leg. (N.J. 2014) (enacted). On October 14, 2014, the Senate and the Assembly passed the bill with a 28-1 vote and 73-4-0 vote, respectively. *Id.* T here is no recorded floor debate or discussion for the 2014 Law. One of the 2014 Law's sponsors, however, touted the legislation as "a short step away from getting this done and a lot closer to bringing sports betting to New Jersey." (Leagues' TRO Br., Dreyer Decl., Ex. 10, ECF No. 12-13 (quoting State Senator Raymond J. Lesniak).) On October 17, 2014, Governor Christie signed the legislation into law. (Oct. 17, 2014 Ltr., 12-4947, ECF No. 173.)

The 2014 Law is designed to *partially repeal* all state laws and regulations prohibiting sports wagering, but only in certain circumstances. The 2014 Law

"partially repeal[s] the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events." S. 2460, 216th Leg. (2014) (enacted). In addition to repealing the 2012 Law, the 2014 Law repeals provisions of New Jersey law governing criminal penalties for gambling, N.J. Stat. Ann. §§ 2C:37-1 to -9, civil penalties for gambling, N.J. Stat. Ann. §§ 2A:40-1 to -9, the regulation of equine breeding and racing, N.J. Stat. Ann. §§ 5:5-1 to -189, and the Casino Control Act, N.J. Stat. Ann. §§ 5:12-1 to -233, as well as "any rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers." N.J. Stat. Ann. § 5:12A-7. The 2014 Law, however, only repeals these laws "to the extent they apply or may be construed to apply [to sports wagering] at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, . . . by persons 21 years of age or older." *Id.* The 2014 Law also excludes "collegiate sports contest[s] or collegiate athletic event[s] that take[] place in New Jersey or . . . sport contest[s] or athletic event[s] in which any New Jersey college team participates regardless of where the event takes place" from the definition of "collegiate sport contest or athletic event." *Id.*

The 2014 Law explicitly states that it "shall be construed to *repeal* State laws and regulations." *Id.* § 5:12A-8 (emphasis added). The legislative statement

immediately following the 2014 Law provides that it implements the Third Circuit's decision in *Christie I*. It quotes select portions of the *Christie I* decision, including that the Third Circuit does "not read PASPA to prohibit New Jersey from repealing its ban on sports wagering," and "it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or *what the exact contours of the prohibition will be*." S. 2460 at 3-4. The 2014 Law also contains a broad severability clause. N.J. Stat. Ann. § 5:12A-9.

In response to the 2014 Law, the Leagues filed a Complaint for Declaratory and Injunctive Relief (the "Complaint") on October 20, 2014, against the State Defendants, the NJTHA, and the NJSEA ("*Christie II*"). (ECF No. 1.) In the Complaint, the Leagues allege that "[f]or years, New Jersey has been attempting to devise a way to get around [PASPA's] unambiguous prohibitions and authorize sports gambling in Atlantic City casinos and horse racetracks throughout the state." (*Id.* ¶ 3.) The Complaint asserts four causes of action: (1) violation of PASPA, 28 U.S.C. § 3702(1), against the State Defendants; (2) violation of the New Jersey Constitution against all Defendants; (3) violation of PASPA, 28 U.S.C. § 3702(1), against the NJSEA; and (4) violation of PASPA, 28 U.S.C. § 3702(2), against the NJTHA. (*Id.* ¶¶ 58-74.) All of the claims asserted by the Leagues are based on violations of PASPA pursuant to the 2014 Law. In the Complaint, the Leagues seek an order declaring that either the 2014 Law violates PASPA or, alternatively, the 2014 Law violates the New Jersey Constitution. (*Id.* at 22-23.) The Leagues additionally seek to enjoin

Defendants from implementing or enforcing the 2014 Law. (*Id.*)

On October 21, 2014, the Court conducted, on the record, a telephone status conference regarding the briefing schedule for the Leagues' application for temporary restraints and a preliminary injunction. During the conference, counsel for the NJTHA confirmed that Monmouth Park planned to start accepting bets on Sunday, October 26, 2014. The same day, the Leagues filed an order to show cause with temporary restraints seeking a temporary restraining order and preliminary injunction against Defendants in both *Christie I* and *Christie II*.[5] On October 22, 2014, the NJSEA, the NJTHA, the State Defendants, and the Legislature Defendants submitted their opposition briefs. The Leagues submitted their reply brief on October 23, 2014. With an extremely limited amount of time to render a decision based on the NJTHA's planned start date for sports wagering, on October 24, 2014, the Court issued an oral opinion from the bench granting the Leagues' application for a temporary restraining order and requiring the Leagues to post a bond, pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, in the amount of $1.7 million.[6]

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[5] As the Court has consolidated its determination of the Leagues' application for a preliminary injunction with a decision on the merits through summary judgment, the Leagues' application for a preliminary injunction is terminated as moot in both *Christie I* (12-4947, ECF No. 174) and *Christie II* (ECF No. 12).

[6] To allow for additional briefing on the Leagues' application for a preliminary injunction, the Court extended the temporary restraining order for an additional fourteen days, until November 21, 2014, and ordered the Leagues to post an additional bond

Also, on October 24, 2014, the Court issued a Scheduling Order requiring the parties to e-file joint correspondence that provided: (1) whether any party sought discovery prior to the Court's decision on the preliminary injunction application, (2) their positions regarding the necessity of a preliminary injunction hearing, and (3) a proposed schedule for supplemental briefing, if necessary. (ECF No. 33.) By correspondence dated October 27, 2014, the parties informed the Court that no discovery was necessary, nor evidentiary hearing required, in connection with the pending preliminary injunction application. (ECF No. 35.)

On November 3, 2014, the NJSEA, the NJTHA, the State Defendants, and the Legislature Defendants submitted their opposition briefs (ECF Nos. 42-44; 12-4947, ECF No. 189). The Leagues submitted a reply brief on November 7, 2014. (ECF No. 49; 12-4947, ECF No. 191.) In an Order dated November 10, 2014, the Court provided notice to all parties of its intention to consolidate the application for a preliminary injunction with a decision on the merits and allowed the parties to file additional correspondence by November 17, 2014. (ECF No. 50; 12-4947, ECF No. 192.) By Order dated November 19, 2014, the Court clarified its earlier Order that "the Court shall consolidate Plaintiffs' application for a preliminary injunction with a decision on the merits through summary judgment." (ECF No. 56.) The Court heard oral argument on November 20, 2014.

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in the amount of $1.7 million by November 10, 2014. (ECF No. 38.)

III. Legal Standard

Rule 65 of the Federal Rules of Civil Procedure "empowers district courts to grant preliminary injunctions." *Doe v. Banos*, 713 F. Supp. 2d 404, 410 (D.N.J.), *aff'd*, 416 F. App'x 185 (3d Cir. 2010). "Because the scope and procedural posture of a hearing for a preliminary injunction is significantly different from a trial on the merits . . . 'it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.'" *Anderson v. Davila*, 125 F.3d 148, 157 (3d Cir. 1997) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). In appropriate circumstances, however, Rule 65(a)(2) provides a district court with the discretion to "advance the trial on the merits and consolidate it with the [preliminary injunction] hearing." Fed. R. Civ. P. 65(a)(2). A district court may also convert a decision on a preliminary injunction application into a final disposition on the merits by granting summary judgment as long as sufficient notice is provided pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See Krebs v. Rutgers*, 797 F. Supp. 1246, 1253 (D.N.J. 1992); *Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1397 n.4 (9th Cir. 1990); *see also* Fed. R. Civ. P. 56(f).

Under Rule 56, summary judgment is appropriate if the record shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[P]reemption is primarily a question of law . . . ." *Jeter v. Brown & Williamson Tobacco Corp.*, 113 F. App'x 465, 467 (3d Cir. 2004); *see Travitz v. Ne. Dep't ILGWU Health & Welfare Fund*, 13 F.3d 704, 708 (3d

Cir. 1994) ("The issue of preemption is essentially legal . . . .") Further, where a court finds the issue of preemption to be dispositive, the remaining claims and issues need not be addressed. *See, e.g.*, *Stepan Co. v. Callahan Co.*, 568 F. Supp. 2d 546, 549 (D.N.J. 2008).

The Third Circuit has held, in accordance with principles of due process, that a district court should give the parties notice of its intent prior to entering summary judgment *sua sponte*. *See Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 280 (3d Cir. 2010). Notice is sufficient, however, "when 'the targeted party had reason to believe the court might reach the issue and received a fair opportunity to put its best foot forward.'" *Zimmerlink v. Zapotsky*, 539 F. App'x 45, 49 (3d Cir. 2013) (quoting *Gibson v. Mayor & Council of City of Wilmington*, 355 F.3d 215, 223-24 (3d Cir. 2004) (finding no notice is required if there is a fully developed record, a lack of prejudice to the parties, and a decision on a purely legal issue)). "Even if a court fails to comply with the requirements of Rule 56(f), however, any such error 'may be excused if the failure was a harmless error.'" *Zimmerlink*, 539 F. App'x at 49 (quoting *Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989)).

Advancing a final disposition on the merits, through summary judgment, and consolidating it with the preliminary injunction application is appropriate in this case. Here, the preliminary injunctive relief the Leagues seek is the same relief they hope to ultimately obtain through a permanent injunction. Additionally, the merits of the case have been extensively briefed by all parties. The parties informed the Court that no discovery or evidentiary hearing was required

on the preliminary injunction application. (Oct. 27, 2014 Ltr., ECF No. 35.) Significantly, the parties' briefing does not identify any factual disputes for the Court to resolve at trial; rather, the parties' primary disagreement concerns whether the 2014 Law is preempted by PASPA. Furthermore, the parties had reason to believe the Court might reach the issue. All of the parties are well aware of the procedural history in *Office of the Commissioner of Baseball v. Markell*, 579 F.3d 293, 297 (3d Cir. 2009), another case interpreting PASPA in which the court consolidated an appeal of a denial of a preliminary injunction with a decision on the merits. In addition, the Leagues raised the request in their briefing. Moreover, the Court provided notice to the parties of its intent to consolidate the Leagues' application for a preliminary injunction with a decision on the merits. While "[i]t is often noted that the wheels of justice move slowly[,] . . . . that is not always the case. When a party seeks injunctive relief, the stakes are high, time is of the essence, and a straightforward legal question is properly presented . . . , prudence dictates that [the court] answer that question with dispatch." *Markell*, 579 F.3d at 297 (finding broad scope of appellate review to decide merits of a purely legal issue on appeal from preliminary injunction ruling). Accordingly, this is an appropriate case in which to consolidate the application for a preliminary injunction with summary judgment, as the Court is presented with purely a legal question.[7]

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[7] On November 17, 2014, all parties submitted correspondence in response to the Court's November 10, 2014 Order providing notice of its intention to consolidate the application for a preliminary injunction with a decision on the merits. The Leagues, the State Defendants, the Legislature Defendants, and the NJSEA

IV. Analysis

The primary question in this case is whether PASPA, a federal statute that prohibits sports wagering pursuant to a state scheme, preempts a state law that *partially repeals* New Jersey's prohibitions on sports wagering at casinos and racetracks in the state. To answer this question, the Court must consider both the Third Circuit's holding in *Christie I* and ordinary preemption principles.

The parties agree that the Third Circuit's decision in *Christie I*, which held that PASPA preempted the 2012 Law and left New Jersey a choice to either maintain or to repeal its prohibition on sports wagering, informs the Court's analysis in this case. The parties disagree, however, as to the exact scope of conduct PASPA operates to preempt. Defendants interpret the Third Circuit's decision in *Christie I* to allow New

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did not object to the Court rendering a summary judgment decision. (ECF Nos. 51, 52, 54.) The NJTHA objects to summary judgment at this stage of litigation. (ECF Nos. 53, 61.) The NJTHA primarily asserts that the Court did not provide fair notice that it would sua sponte consider summary judgment. In addition, the NJTHA intends to assert Plaintiffs' unclean hands as an affirmative defense. The Court is not persuaded by either argument. The Court provided notice to all parties on November 10, 2014, of its intention to consolidate the preliminary injunction application with a decision on the merits. The Court also provided the parties with the opportunity to raise any issues. After careful consideration of the NJTHA's arguments, the Court nevertheless finds its notice sufficient in light of the legal nature of the inquiry. In addition, no injunction is being entered against the NJTHA. Therefore, it is unnecessary for the Court to determine the validity of the NJTHA's assertion of unclean hands. The dispositive legal issue before the Court, as the NJTHA conceded at oral argument, is whether the 2014 Law is invalid as preempted by PASPA. (Oral Arg. Tr. 42:5-9 Nov. 20, 2014.)

Jersey to "partially repeal any existing laws that apply to sports wagering (as New Jersey has done with the [2014 Law])." (Legislature Defs.' Opp'n Br. 4, 12-4947, ECF No. 189.) On the other hand, the Leagues insist that the Third Circuit's holding in *Christie I* requires that New Jersey either maintain its prohibition or completely deregulate the field of sports wagering.[8] (Leagues' TRO Br. 17, ECF No. 12.)

The Court agrees with the Leagues' main contention, namely, that the 2014 Law is preempted by PASPA. The Court, however, finds that the present case is not nearly as clear as either the Leagues or the Defendants assert. This case presents the novel issue of whether the 2014 Law, which purports to *partially repeal* New Jersey legislation, nevertheless is preempted by PASPA. In analyzing this novel issue, the Court will begin by discussing the Third Circuit's decision in *Christie I*, including the scope of its holding and the instruction it provides for deciding the present inquiry. The Court will then discuss relevant preemption principles.

A. The Third Circuit's Decision in *Christie I*

The Third Circuit in *Christie I* affirmed this Court's decision and, in doing so, found that PASPA was a constitutional exercise of Congress's Commerce Clause power and did not violate anti-commandeering

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[8] The Leagues appeared to retreat from an "all or nothing" position during oral argument. At oral argument counsel suggested that when there is not a complete repeal, preemption must be determined on a case-by-case basis. (Oral Arg. Tr. 11:11-16 Nov. 20, 2014.)

principles derived from the Tenth Amendment. Accordingly, as much as Defendants would prefer, *Christie II* is not, and cannot be, about the constitutionality of PASPA; instead, *Christie II* concerns the doctrine of preemption. While the Third Circuit in *Christie I* addressed the issue of preemption and found that PASPA "operates via the Supremacy Clause to invalidate contrary state action," it did so only in the context of the 2012 Law. The Third Circuit's reasoning in *Christie I*, however, provides a framework for the analysis of the issues raised in *Christie II*: whether PASPA's preemptive scope operates to invalidate the 2014 Law. Of particular relevance are (1) the Third Circuit's findings as to the congressional purpose of PASPA and (2) the Third Circuit's discussion as to what PASPA prohibits with respect to state legislation regarding sports wagering under its anti-commandeering analysis.

1. The Third Circuit's Findings as to the Congressional Purpose of PASPA

In affirming *Christie I*, the Third Circuit looked directly to the text and legislative history of PASPA to determine Congress's intent. In gleaning Congress's intent, the Third Circuit found that the goal of Congress in enacting PASPA was "to ban gambling pursuant to a state scheme— because Congress was concerned that state-sponsored gambling carried with it a label of legitimacy that would make the activity appealing." *Christie I*, 730 F.3d at 237. As the Third Circuit noted in *Christie I*, Congress saw "'[s]ports gambling [as] a national problem' . . . because '[o]nce a State legalizes sports gambling, it will be extremely difficult for other States to resist the lure.'" *Id.* at 216

(quoting S. Rep. 102-248, at 5). Congress was concerned that "[w]ithout Federal legislation, sports gambling [would] likely . . . spread on a piecemeal basis and ultimately develop an irreversible momentum." S. Rep. 102-248, at 5. Although all but one state prohibited sports gambling at the time PASPA was enacted in 1992, *Christie I*, 730 F.3d at 234, Congress was cognizant that states were beginning to consider a wide variety of gambling schemes that would allow sports gambling in their states, including New Jersey. *See* S. Rep. 102-248, at 5. Thus, the Third Circuit saw PASPA as Congress's way of making it harder for states to "to turn their backs on the choices they previously made." *Christie I*, 730 F.3d at 234.

The Third Circuit's analysis of the congressional purpose behind PASPA demonstrates that Congress's concern with sports wagering extended beyond the mere form of a state's regulation. Rather, Congress's concern related to the potential for "state scheme[s]" implementing sports gambling and the "label of legitimacy" that would exist as a result. By imposing a hard choice, Congress sought to avoid the appearance of state-sanctioned sports wagering. The Third Circuit's findings regarding the congressional purpose of PASPA provide a backdrop to this Court's application of preemption principles to PASPA and the 2014 Law.

2. The Third Circuit's Anti-Commandeering Analysis

In determining whether PASPA impermissibly commandeers the states, the Third Circuit in *Christie I* first found that PASPA uses "classic preemption language that operates, via the Constitution's Supremacy Clause, to invalidate state laws that are contrary to

the federal statute." *Christie I*, 730 F.3d at 226 (citations omitted). Finding that PASPA clearly preempts contrary state law through the Supremacy Clause, the Third Circuit turned to Defendants' argument that PASPA nonetheless violates anti-commandeering principles. *Id.* at 228. In support of this analysis, the Third Circuit provided an in-depth and comprehensive review of the Supreme Court's anti-commandeering jurisprudence. *Id.* at 227-29. The Third Circuit then applied the principles derived from that jurisprudence to determine whether PASPA violates the anti-commandeering principle when it "simply operate[s] to invalidate contrary state law" under the Supremacy Clause. *Id.* at 230. The Third Circuit recognized that no court has ever held that "applying the Supremacy Clause to invalidate a state law contrary to federal proscriptions is tantamount to direct regulation over the states, to an invasion of their sovereignty, or to commandeering." *Id.* at 229-30.

The Third Circuit then determined that the mandate of PASPA is unlike those federal laws that had previously been struck down on the basis of impermissible commandeering. The Supreme Court in *New York v. United States*, 505 U.S 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), struck down federal laws on the basis that both required some affirmative action on the part of states in order to implement the federal law at issue. *Christie I*, 730 F.3d at 231. In connection with this distinction, the Third Circuit confronted Defendants' position that PASPA "impose[s] an affirmative requirement [on] states . . . , by prohibiting them from repealing anti- sports wagering provisions." *Id.* at 232. The court rejected this argument, holding instead that PASPA does not restrict

states from removing their prohibitions on sports betting. "Nothing in [Section 3702(1)] *requires* that the states keep any law in place." *Id.* (emphasis in original). Rather, the court stated, "[a]ll that is prohibited is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] *by law*' of gambling schemes." *Id.* (emphasis and alterations in original). That is, the Third Circuit found PASPA preempts only a state's support of sports wagering through legislative action. The court continued, "[w]e do not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Id.* (emphasis in original). In other words, "the lack of an affirmative prohibition on an activity does not mean it is *affirmatively* authorized by law." *Id.* (emphasis in original).

Concluding that PASPA's prohibition was different than the affirmative requirements struck down in *New York* and *Printz*, the Third Circuit reasoned that "PASPA's straightforward *prohibition* on action may be recast as presenting two *options*." *Id.* at 233 (emphasis in original). Under the framework of PASPA, according to the Third Circuit, states are presented with "two 'choices,'" neither of which "affirmatively require[] the states to enact a law, and both choices leave much room for the states to make their own policy":

> [O]*n the one hand, a state may repeal its sports wagering ban*, a move that will result in the expenditure of no resources or effort by any official. *On the other hand, a state may choose to keep a complete ban on sports gambling*, but it is left up to each state to decide how much of a law enforcement priority it wants to make

> of sports gambling, or what the exact contours of the prohibition will be.[9]

Id. (emphasis added). Thus, the Third Circuit recognized that a state's choice in eliminating its ban on sports wagering is limited to a simple repeal. Conversely, if a state chooses to maintain its prohibition, the state possesses a degree of flexibility, both in its enforcement of the prohibition and in its definition of the "complete ban['s]" "exact contours." Further, the Third Circuit emphasized that these two choices are "not easy choices." *Id.* "But the fact that Congress gave the states a hard or tempting choice does not mean that they were given no choice at all." *Id.* Indeed, the court reasoned that "Congress may have suspected that most states would choose to keep an actual prohibition on sports gambling on the books, rather than permit that activity to go unregulated."[10] *Id.*

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[9] Defendants go to great lengths to recast this passage in a light contrary to its meaning. The entire passage is included in full so that its context can be examined.

[10] The Supreme Court's anti-commandeering jurisprudence, which the Third Circuit relied upon, provides additional support for this reading of *Christie I*. In *F.E.R.C. v. Mississippi*, the Court similarly recognized a binary choice put to states: "either abandon[] regulation of the field altogether or consider[] the federal standards." 456 U.S. 742, 766, 767 n.30 (1982) ("[H]ere, the States are asked to regulate in conformity with federal requirements, or not at all."). The Court also recognized this choice to be a hard choice for states to make; yet, the difficulty of the choice did "not change the constitutional analysis." *Id.* at 767 ("[I]t may be unlikely that the States will or easily can abandon regulation of public utilities to avoid PURPA's requirements."). Similarly, the Court, in New York, recognized this recurrent choice in anti-commandeering cases. 505 U.S. at 167 ("[W]here Congress has the authority to regulate private activity under the Commerce

This interpretation of the Third Circuit's decision is buttressed by the opinion of The Honorable Thomas I. Vanaskie, U.S.C.J., in *Christie I*, concurring in part and dissenting in part. Judge Vanaskie dissented from the majority on the specific basis that PASPA impermissibly commandeered state governments. *Id.* at 241 (Vanaskie, J., dissenting). Judge Vanaskie's position was a direct result of the majority's determination regarding the scope of PASPA: "according to my colleagues, PASPA essentially gives the states the choice of allowing totally unregulated betting on sporting events or prohibiting all such gambling." *Id.*; *see also id.* at 250 n.9 ("The majority asserts that the two 'choices' presented to a state by PASPA—to 'repeal its sports wagering ban [or] to keep a complete ban on sports wagering'—'leave much room for the states to make their own policy.'").

Based on the foregoing review, the Third Circuit discerned that PASPA offers two choices to states: a state may either maintain its prohibition on sports betting or may completely repeal its prohibition. The Third Circuit held that even if these are a state's only choices under PASPA, the law does not violate anti-commandeering principles and thus is constitutional. Although some portions of the court's opinion, read in isolation, may suggest a contrary position, the Third Circuit's decision, in its entirety, interprets PASPA to allow states only these two options. These principles

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Clause, we have recognized Congress's power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.") (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

provide a guide to this Court in determining whether the 2014 Law is preempted by PASPA.

B. Preemption Principles

As discussed, ordinary preemption principles also guide the Court's decision. Preemption doctrine is rooted in the Supremacy Clause of the United States Constitution. Article VI declares that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under the Supremacy Clause, state law that "interferes with or is contrary to federal law" is preempted. *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 395 (3d Cir. 2010) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). "While the Supremacy Clause plainly provides Congress with the constitutional power to preempt state law, the challenge for courts has been deciding when a conflict between state and federal law requires application of that power." *Deweese v. Nat'l R.R. Passenger Corp.*, 590 F.3d 239, 245 (3d Cir. 2009) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Over the years, the Supreme Court has recognized three types of preemption: express preemption, implied conflict preemption, and field preemption.[11] *See*

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[11] The Third Circuit in *Christie I*, in an alternative holding, held that, "to the extent PASPA coerces the states into keeping in place their sports-wagering bans," such coercion does not violate principles of anti-commandeering because Congress could otherwise have preempted the field. See 730 F.3d at 235-36. Looking at PASPA in the context of field preemption, the Third Circuit found that "PASPA gives states the choice of either implementing a ban on sports gambling or of accepting complete deregulation of that field as per the federal standard." *Id.* at 235.

Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985). "A federal enactment expressly preempts state law if it contains language so requiring." *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233, 239 (3d Cir. 2009), *aff'd sub nom., Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011) (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001)). When construing an express preemption clause, a reviewing court must begin by examining the "plain wording of the clause," as this "necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). "Though the language of the provision offers a starting point, courts are often called upon to 'identify the domain expressly pre-empted by that language.'" *Bruesewitz*, 561 F.3d at 239 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996)); *see also Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) ("If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains."). This analysis is guided by two principles: (1) "[c]ongressional purpose is the ultimate touchstone of [the] inquiry," and (2) "courts must operate under the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress." *Bruesewitz*, 561 F.3d at 239 (internal quotations, citations, and alterations omitted).

Implied conflict preemption "nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an obstacle to the accomplishment

and execution of the full purposes and objectives of Congress." *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010) (internal quotations omitted). "When confronting arguments that a law stands as an obstacle to [c]ongressional objectives, a court must use its judgment: 'What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.'" *Bruesewitz*, 561 F.3d at 239 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000)). "Furthermore, implied preemption may exist even in the face of an express preemption clause." *Id.* at 239; *see also Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) ("Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not pre- empted," but that "does not mean that the express clause entirely forecloses any possibility of implied pre-emption."). And while "courts define the categories of preemption separately[,] the categories are not 'rigidly distinct.'" *Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 406 (3d Cir. 2012), *cert. denied sub nom., Dir. of Dep't of Revenue of Mont. v. Dep't of Treasury*, 133 S. Ct. 2735 (2013) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)).

C. The 2014 Law is Preempted by PASPA

In light of the Third Circuit's decision in *Christie I* and with the above preemption principles in mind, the Court must now determine whether the 2014 Law is preempted by PASPA.[12] Count One of the League's

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[12] The State Defendants claim that because the 2014 Law is self-executing—that is, "the State Defendants have no involvement in [its] enforcement or administration"—the Eleventh Amendment bars this Court's adjudication of the Leagues' claim

Complaint asserts that the 2014 Law violates PASPA, and thus, the 2014 Law must be declared unlawful. (Compl. ¶¶ 58-61, ECF No. 1.) The 2014 Law only partially repeals prohibitions on sports wagering in New Jersey. Specifically, the 2014 Law "repeals" only those prohibitions "to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older." N.J. Stat. Ann. § 5:12A-7. The 2014 Law additionally excludes "collegiate sport contest[s] or collegiate athletic event[s] that take[] place in New Jersey or . . . sport contest[s] or athletic event[s] in which any New Jersey college team participates regardless of where the event takes place" from the definition of "collegiate sport contest

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that the 2014 Law is in violation of PASPA. (State Defs.' Opp'n Br. 3, ECF No. 44.) Defendants rely on a Third Circuit case, *1st Westco Corp. v. School District of Philadelphia*, for the proposition that the Eleventh Amendment bars the Leagues' claim because suit against a state official may only be brought where "the official has either enforced, or threatened to enforce, the statute" in question. 6 F.3d 108, 113 (3d Cir. 1993) (citing *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988)). In *Westco*, the court, however, relied exclusively on another Third Circuit case, *Rode v. Dellarciprete*. In *Rode*, the court implicitly recognized an exception to the defendant-enforcement connection requirement, where the statute at issue is self-enforcing and thus no enforcement is required. 845 F.2d at 1208. Moreover, the statute at issue in Westco specifically placed enforcement in the hands of an entity other than the government official who was named as a defendant; accordingly, the court was primarily concerned with *the identity* of the state official being sued. 6 F.3d at 113. Thus, the Eleventh Amendment does not bar Plaintiffs' claim against the State Defendants.

or athletic event." *Id.* Defendants argue that this type of *partial repeal* is "[e]xpressly [a]uthorized [b]y [t]he Third Circuit's [d]ecision" in *Christie I*. (State Defs.' Opp'n Br. 15, ECF No. 44.) However, the court "must . . . identify the domain expressly pre-empted by [the] language" of PASPA. *Medtronic Inc.*, 518 U.S. at 484 (internal quotations omitted).

PASPA expressly states that it is unlawful for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. 28 U.S.C. § 3702(1). The Third Circuit, in *Christie I*, already held this language to be that of express preemption. Though this language "offers a starting point" in the preemption analysis, a court must still determine the scope and reach of the provision. *Bruesewitz*, 561 F.3d at 239.

Again, courts seeking to identify the scope of an express preemption provision are compelled to consider "[c]ongressional purpose [as] the 'ultimate touchstone' of [the] inquiry." *Lorillard Tobacco Co.*, 533 U.S. at 541 (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)). In determining Congress's purpose, it is "appropriate to consider legislative history to resolve ambiguity in the scope of an express preemption provision." *Bruesewitz*, 561 F.3d at 244; *see also Cipollone*, 505 U.S. at 519 (citing language from a House of Representative report issued during Congress's consideration of the legislation); *Lorillard Tobacco Co.*, 533 U.S. at 542 (stating that the Court's task was to "identify the domain expressly pre-empted" and that this was aided "by considering the predecessor pre-emption provision and the circumstances in which the current language was adopted").

The Court is guided by the Third Circuit's determination of the congressional purpose of PASPA—" to ban gambling pursuant to a state scheme . . . because Congress was concerned that state-sponsored gambling carried with it a label of legitimacy that would make the activity appealing." *Christie I*, 730 F.3d at 237. In 1992, when Congress enacted PASPA, it was aware that all but one state had broad prohibitions on sports wagering. As the Third Circuit found, Congress sought to make it harder for states "to turn their backs on the choices they previously made." *Id.* at 234. Congress knew states, including New Jersey, were considering whether to allow some form of sports wagering and was concerned that the spread of sports wagering on "a piecemeal basis" would ultimately result in "an irreversible momentum" of sports wagering in the country. S. Rep. 102-248, at 5. In this Court's view, the Senate Report and the Third Circuit's finding of congressional purpose support the conclusion that PASPA preempts the type of *partial repeal* New Jersey is attempting to accomplish in the 2014 Law, by allowing some, but not all, types of sports wagering in New Jersey, thus creating a label of legitimacy for sports wagering pursuant to a state scheme.

This conclusion is supported by the two choices the Third Circuit held available to states under PASPA. The State Defendants argue that "Plaintiffs cannot now dismiss New Jersey's careful effort to stay on the repeal side of the dichotomy by asserting that there is no practical difference in effect between its repeal and authorization." (State Defs.' Opp'n Br. 18, ECF No. 44.) While the Third Circuit was focused primarily on anti-commandeering and not preemption,

this Court reads the Third Circuit's decision in *Christie I* to hold that anything outside of these "two choices" would leave states *too much room* to circumvent the ultimate intent of Congress.

In the context of a preemption analysis, federal courts have been unwilling to allow states to do indirectly what they may not do directly. "The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of [a] word," *Howlett v. Rose*, 496 U.S. 356, 382-83 (1990), nor can it "be evaded by formalism," which would only "provide a roadmap for States wishing to circumvent" federal law, *Haywood v. Drown*, 556 U.S. 729, 742 & n.9 (2009). *See also* 1A Sutherland Statutory Construction §22:1 (7th ed. 2009) ("For purposes of interpretation, an act's effect and not its form is controlling."); *cf. Aetna Health Inc. v. Davila*, 542 U.S. 200, 214-15 (2004) (holding a party may not evade federal preemption by elevating form over substance in connection with the naming of a cause of action).[13] To accept the State Defendants' argument, the Court would be allowing the 2014 Law to stand as a sufficient obstacle to accomplishing the full purpose and objective of Congress in enacting PASPA. While styled as a *partial repeal*, the 2014 Law would have the same primary effect of the 2012 Law—allowing sports wagering in New Jersey's casinos and racetracks for individuals age twenty-one and over but not on college sporting events that take place in New Jersey or on New Jersey college teams. This necessarily

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[13] "Abraham Lincoln once asked: If Congress said that a goat's tail was a leg, how many legs would a goat have? Four. Calling a tail a leg does not make it so." *City of Houston v. Am. Traffic Solutions, Inc.*, No. 10-4545, 2011 WL 2462670, at *3 (S.D. Tex. June 17, 2011).

results in sports wagering with the State's imprimatur, which goes against the very goal of PASPA—to ban sports wagering pursuant to a state scheme. The Third Circuit recognized that the choice PASPA left states might be a hard choice, but here New Jersey is not making that hard choice, and the Court cannot ignore Congress's intent in enacting PASPA just because New Jersey carefully styled the 2014 Law as a repeal.[14]

Moreover, in the preemption context, courts have looked to the *state* statute's legislative history as "an important source for determining whether a particular statute was motivated by an impermissible motive in the preemption context." *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 419 (2d Cir. 2013); *see also Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1251-53 (10th Cir. 2004); *Long Island Lighting Co. v. Cnty. of Suffolk, N.Y.*, 628 F. Supp. 654, 665-66 (E.D.N.Y. 1986); *Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 145 (2d Cir. 2006). Over the last twenty years, New Jersey has changed course with regard to its policy on sports wagering and now wants to bring sports betting to New Jersey in a limited capacity. The 2014 Law was

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[14] Despite the New Jersey Legislature's wording, statutory interpretation principles indicate that the 2014 Law may be construed as an amendatory act rather than a repeal. See 1A Sutherland Statutory Construction §22:1 (7th ed. 2009) ("[A]ny change of the scope or effect of an existing statute, by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form, is treated as amendatory."). As a consequence, the State Defendants' attempt to fit the 2014 Law into one of the options left by the Third Circuit is even more attenuated.

passed in less than a week and provides no legislative history for the Court to examine. However, one of the 2014 Law's sponsors stated that he saw the legislation as "a short step away from getting this done and a lot closer to bringing sports betting to New Jersey." (Leagues' TRO Br., Dreyer Decl., Ex. 10, ECF No. 12-13 (quoting State Senator Raymond J. Lesniak).) A s noted above, the goal of PASPA is to "keep sports gambling from spreading" pursuant to a state scheme. S. Rep. 102-248, at 5; *see also Christie I*, 730 F.3d at 237. New Jersey's attempt to allow sport wagering in only a limited number of places, most of which currently house some type of highly regulated gambling by the State, coupled with New Jersey's history of attempts to circumvent PASPA, leads to the conclusion that the 2014 Law is in direct conflict with the purpose and goal of PASPA and is therefore preempted.

New Jersey's position on sports wagering is not unique. In fact, many states are currently rethinking their prohibitions on sports wagering. In *Christie I*, this Court indicated that it could not judge the wisdom of PASPA but only speak to PASPA's legality as a matter of constitutional law. The Third Circuit made a similar recognition in *Christie I*. The Court is yet again faced with similar constraints in *Christie II* and still may not judge the wisdom of PASPA. To the extent the people of New Jersey, or any state, disagree with PASPA, their primary remedy is through the repeal or amendment of PASPA in Congress.

For the foregoing reasons, this Court grants summary judgment for the Leagues on Count One of the

Complaint and holds that the 2014 Law is invalid as preempted by PASPA.[15]

D. Counts Two, Three, and Four of the Complaint

In their Complaint, the Leagues alternatively assert a claim against all Defendants that the 2014 Law is a violation of the New Jersey Constitution. The Leagues allege that if the 2014 Law is not a violation of PASPA, "then it violates Article IV, Section VII of the New Jersey Constitution" and is thus unlawful. (Compl. ¶ 64, ECF No. 1.)

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[15] The Legislature Defendants alternatively argue that if the Court "finds that a portion of the [2014 Law] is likely to violate PASPA, the Court must conduct the severability analysis to determine the proper scope of any injunction." (Legislature Defs.' Opp'n Br. 12 n.9, 12-4947, ECF No. 189.) "When a federal court is called upon to invalidate a state statute, the severability of the constitutional portions of the statute are governed by state law . . . ." *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1072 (3d Cir. 1994). The 2014 Law contains a broad severability clause. "Under New Jersey law, however, such a provision merely creates a presumption that the invalid sections of the [statute] are severable." *Old Coach Dev. Corp., Inc. v. Tanzman*, 881 F.2d 1227, 1234 (3d Cir. 1989) (citing *Inganamort v. Borough of Fort Lee*, 72 N.J. 412, 422 (1977)). The critical inquiry is "whether the legislature would have enacted the remaining sections of the statute without the objectionable part." *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1225 (D.N.J. 1981) (citation omitted). The New Jersey Legislature's intent has been clear: to permit gambling only at New Jersey racetracks and casinos for individuals age twenty-one and older, with the exception of wagering on college sporting events that take place in New Jersey or on New Jersey college teams. To sever the 2014 Law to provide for a complete repeal of all New Jersey's prohibitions on sports wagering would be to enact legislation never intended by its proponents.

The Court declines to entertain this claim. The Eleventh Amendment does not preclude suits against state officers for injunctive relief. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). The Supreme Court, however, made an exception to *Ex parte Young*, that state officers may not be sued on pendent state law claims. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121-22 (1984). In *Pennhurst*, the Supreme Court found that "when a plaintiff alleges that a state official has violated *state* law. . . . [a] federal court's grant of relief against state officials on the basis of state law . . . does not vindicate the supreme authority of federal law." *Id.* at 106. As a result, the Eleventh Amendment precludes the Leagues' claim against the State Defendants under the New Jersey Constitution.

Additionally, the Court is cognizant that not every Defendant is an agency or officer of the State; however, in accordance with 28 U.S.C. § 1367(c)(1), the Court, in its discretion, declines to exercise supplemental jurisdiction over the Leagues' alternative claim under the New Jersey Constitution.

The Leagues also assert claims against the NJSEA and the NJTHA for violation of PASPA. (Compl. ¶¶ 66-74, ECF No. 1.) The Leagues' claims against the NJSEA and the NJTHA are only for violation of PASPA *pursuant to* the 2014 Law. (*Id.* ¶¶ 68-69, 72, 74.) Accordingly, the preemption of the 2014 Law renders these claims moot.[16]

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[16] At oral argument, counsel for the Leagues acknowledged: "The last point I'd like to make on the merits concerns proposed sports gambling at Monmouth Park. Once again, you do not need

E. Permanent Injunction

Having determined that the 2014 Law is preempted and summary judgment for the Leagues on Count One of the Complaint is appropriate, the Court finds that the Leagues are also entitled to a permanent injunction against the State Defendants. As the Court reasoned in *Christie I*, it may be "debatable whether a separate showing for a permanent injunction is necessary where New Jersey is in clear violation of a valid federal statute"; however, "the Court is likely bound to enter the requested injunctive relief." *Christie I*, 926 F. Supp. 2d at 577 (citing *Markell*, 579 F.3d at 304). Accordingly, the Court will analyze the four factors necessary for an injunction. "This four factor test requires a demonstration: (1) of irreparable injury; (2) of inadequacy of remedies at law to compensate for said injury; (3) that a balance of the hardships favors the party seeking the injunction; and (4) that a permanent injunction would serve the public interest." *Id.* at 577-78 (citing *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)).

Similar to the Court's decision in *Christie I*, the Leagues have demonstrated the necessary factors for the Court to grant a permanent injunction. The Leagues have demonstrated irreparable harm in that the 2014 Law was enacted in violation of and is preempted by PASPA. This violation constitutes irreparable harm requiring the issuance of a permanent injunction, and there are no factual issues that need to be decided, contrary to the NJTHA's assertion at oral argument, to make a finding of irreparable harm

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to reach this issue to find that the 2014 Law violates PASPA." (Oral Arg. Tr. 14:2-5 Nov. 20, 2014.)

in this case. *See Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 622-23 (D.N.J. 2010), *order clarified* (Jan. 14, 2011), *aff'd sub nom., N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012); *Ass'n for Fairness in Bus., Inc. v. New Jersey*, 82 F. Supp. 2d 353, 363 (D.N.J. 2000) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm." (quoting *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997))). Additionally, under the Eleventh Amendment, a legal remedy is unavailable to the Leagues. *See Temple Univ. v. White*, 941 F.2d 201, 215 (3d Cir. 1991) ("As to the inadequacy of legal remedies, the Eleventh Amendment bar to an award of retroactive damages against the Commonwealth [of Pennsylvania] clearly establishes that any legal remedy is unavailable and that the only relief available is equitable in nature." (internal citation omitted)). While Defendants again make strong arguments in support of the 2014 Law as a policy matter, the grant of a permanent injunction will do nothing more than require the State Defendants to comply with federal law. *See Coach, Inc. v. Fashion Paradise, LLC*, No. 10-4888, 2012 WL 194092, at *9 (D.N.J. Jan. 20, 2012) ("The only hardship imposed upon the Defendants is that they obey the law."); *Port Drivers Fed'n 18, Inc. v. All Saints Express, Inc.*, 757 F. Supp. 2d 443, 461 (D.N.J. 2010). Lastly, the public interest factor weighs in favor of a permanent injunction by protecting and upholding the supremacy of valid federal law. *See Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) (affirming the district court's finding that "the public interest was not served by the enforcement of an unconstitutional law") (citation and

quotation marks omitted), *aff'd and remanded*, 542 U.S. 656 (2004).

Accordingly, the Court has found the 2014 Law to be invalid because it is preempted by PASPA, and the State Defendants are permanently enjoined from violating PASPA through giving operation or effect to the 2014 Law in its entirety.

V. Conclusion

After careful consideration of the parties' submissions and arguments, the Court has determined that the 2014 Law is invalid, under the Supremacy Clause of the United States Constitution, as preempted by PASPA. Therefore, summary judgment is GRANTED in favor of Plaintiffs on Count One of the Complaint. Plaintiffs have also demonstrated that they are entitled to a permanent injunction against the State Defendants. Counts Two, Three, and Four of the Complaint are DISMISSED as moot. An Order consistent with this Opinion will be filed on this date.

s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

Dated: November 21, 2014

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	Civil Action No. 12-4947 (MAS) (LHG) **ORDER**

This matter comes before the Court upon several motions filed by the Parties. The National Collegiate Athletic Association ("NCAA"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"), and Office of the Commissioner of Baseball doing business as Major League Baseball ("MLB") (collectively, "Plaintiffs" or "the Leagues") filed their Complaint on August 7, 2012. (Compl., ECF No. 1.) On August 10, 2012, Plaintiffs filed a "Motion for Summary Judgment and, If Necessary to Preserve the Status Quo, a Preliminary Injunction" seeking to enjoin Defendants Christopher J. Christie, Governor of the State of New Jersey, David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and Frank Zanzuccki, Executive Director of the New Jersey Racing Commission (collectively, "Defendants" or the

"State"), from implementing N.J. Stat. Ann. 5:12A-1, *et seq.* (2012) ("New Jersey's Sports Wagering Law" or "Sports Wagering Law"). (Pls.' Mot. Summ. J., ECF No. 10.)

On November 21, 2012, Defendants filed a Cross Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment. (Defs.' Cross Mot. Summ. J., ECF No. 76.) On the same date, the New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA"), and Sheila Oliver and Stephen Sweeney ("Legislative Intervenors") filed Motions to Intervene, which included opposition to Plaintiffs' Summary Judgment Motion. (NJTHA's Mot. to Intervene, ECF No. 72; Legislative Intervenors' Mot. to Intervene, ECF No. 75.) NJTHA's and the Legislative Intervenors' Motions to Intervene were subsequently granted on December 11, 2012. (ECF No. 102.) The Leagues filed a Reply in support of their Motion for Summary Judgment, as well as Opposition to Defendants' Cross Motion, on December 7, 2012. (Pls.' Reply & Opp'n, ECF No. 95.) That submission included a request for a permanent injunction. (*Id.* at 20.)

On January 22, 2013, the United States filed a Notice of Intervention. (ECF No. 128.) The DOJ filed its brief on February 1, 2013. (DOJ's Br., ECF No. 136.) On February 8, 2013, NJTHA, Legislative Intervenors, and Defendants filed additional submissions in response to the DOJ's February 1, 2013 brief. (ECF Nos. 138, 139 and 140, respectively). The Court heard oral argument on the Cross Motions for Summary Judgment on February 14, 2013. (ECF No. 141.)

The Court, having considered the Parties' submissions, for the reasons stated in the Opinion filed on this date, and for other good cause shown,

IT IS on this 28th day of February, 2013, **ORDERED** that:

1) Plaintiffs' Motion for Summary Judgment (ECF No. 10) is **GRANTED**;

2) Plaintiffs' Request for a Permanent Injunction (ECF No. 95) is **GRANTED**; and

3) Defendants' Cross Motion for Summary Judgment (ECF No. 76) is **DENIED**.

/s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

APPENDIX F

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13-1713

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL;

UNITED STATES OF AMERICA (Intervenor in the District Court)

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; STEPHEN M. SWEENEY; SHEILA Y. OLIVER (Intervenors in District Court)

Stephen M. Sweeney and Sheila Y. Oliver,
Appellants

No. 13-1714

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL;

UNITED STATES OF AMERICA (Intervenor in the District Court)

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; STEPHEN M. SWEENEY; SHEILA Y. OLIVER (Intervenors in District Court)

New Jersey Thoroughbred Horsemen's Association, Inc.,
Appellant

No. 13-1715

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association;
NATIONAL BASKETBALL ASSOCIATION, a joint venture;
NATIONAL FOOTBALL LEAGUE, an unincorporated association;
NATIONAL HOCKEY LEAGUE, an unincorporated association;
OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL;

UNITED STATES OF AMERICA (Intervenor in the District Court)

v.

GOVERNOR OF THE STATE OF NEW JERSEY;
DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey;
FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; STEPHEN M. SWEENEY;
SHEILA Y. OLIVER (Intervenors in District Court)

Governor of the State of New Jersey; David L. Rebuck and Frank Zanzuccki,
Appellants

On Appeal from the United States District Court
for the District of New Jersey

(Civil Action No. 3-12-cv-04947)
District Judge: Hon. Michael A. Shipp

Argued: June 26, 2013

Before: FUENTES, FISHER, and VANASKIE, Circuit Judges.

(Opinion Filed: September 17, 2013)

* * *

OPINION OF THE COURT

FUENTES, Circuit Judge:

Betting on sports is an activity that has unarguably increased in popularity over the last several decades. Seeking to address instances of illegal sports wagering within its borders and to improve its economy, the State of New Jersey has sought to license gambling on certain professional and amateur sporting events. A conglomerate of sports leagues, displeased at the prospect of State-licensed gambling on their athletic contests, has sued to halt these efforts. They contend, alongside the United States as intervening plaintiff, that New Jersey's proposed law violates a federal law that prohibits most states from licensing sports gambling, the Professional and Amateur Sports Protection Act of 1992 (PASPA), 28 U.S.C. § 3701 *et seq.*

In defense of its own sports wagering law, New Jersey counters that the leagues lack standing to bring this case because they suffer no injury from the

State's legalization of wagering on the outcomes of their games. In addition, alongside certain intervening defendants, New Jersey argues that PASPA is beyond Congress' Commerce Clause powers to enact and that it violates two important principles that underlie our system of dual state and federal sovereignty: one known as the "anti-commandeering" doctrine, on the ground that PASPA impermissibly prohibits the states from enacting legislation to license sports gambling; the other known as the "equal sovereignty" principle, in that PASPA permits Nevada to license widespread sports gambling while banning other states from doing so. The District Court disagreed with each of these contentions, granted summary judgment to the leagues, and enjoined New Jersey from licensing sports betting.

On appeal, we conclude that the leagues have Article III standing to enforce PASPA and that PASPA is constitutional. As will be made clear, accepting New Jersey's arguments on the merits would require us to take several extraordinary steps, including: invalidating for the first time in our Circuit's jurisprudence a law under the anti-commandeering principle, a move even the United States Supreme Court has only twice made; expanding that principle to suspend commonplace operations of the Supremacy Clause over state activity contrary to federal laws; and making it harder for Congress to enact laws pursuant to the Commerce Clause if such laws affect some states differently than others.

We are cognizant that certain questions related to this case—whether gambling on sporting events is harmful to the games' integrity and whether states

should be permitted to license and profit from the activity—engender strong views. But we are not asked to judge the wisdom of PASPA or of New Jersey's law, or of the desirability of the activities they seek to regulate. We speak only to the legality of these measures as a matter of constitutional law. Although this "case is made difficult by [Appellants'] strong arguments" in support of New Jersey's law as a policy matter, *see Gonzales v. Raich*, 545 U.S. 1, 9 (2005), our duty is to "say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803). "If two laws conflict with each other, the courts must decide on the operation of each." *Id.* New Jersey's sports wagering law conflicts with PASPA and, under our Constitution, must yield. We will affirm the District Court's judgment.

I. LEGAL FRAMEWORK

Wagering on sporting events is an activity almost as inscribed in our society as participating in or watching the sports themselves. New Jersey tells us that sports betting in the United States—most of it illegal—is a $500 billion dollar per year industry. And scandals involving the rigging of sporting contests in the interest of winning a wager are as old as the games themselves: the infamous Black Sox scandal of the 1919 World Series, or Major League Baseball's ("MLB") lifetime ban on all-time hits leader Pete Rose for allegedly wagering on games he played in come to mind. And the recent prosecution of Tim Donaghy, a National Basketball Association ("NBA") referee who bet on games that he officiated, reminds us of problems that may stem from gambling.

However, despite its pervasiveness, few states have ever licensed gambling on sporting events. Nevada alone began permitting widespread betting on sporting events in 1949 and just three other states—Delaware, Oregon, and Montana—have on occasion permitted limited types of lotteries tied to the outcome of sporting events, but never single-game betting. Sports wagering in all forms, particularly State-licensed wagering, is and has been illegal elsewhere. *See, e.g.*, 18 Pa. Cons. Stat. Ann. § 5513; Del. Code Ann. tit. 11, § 1401, *et seq.* Congress took up and eventually enacted PASPA in 1992 in response to increased efforts by states to begin licensing the practice.

A. The Professional and Amateur Sports Protection Act of 1992

PASPA's key provision applies for the most part identically to "States" and "persons," providing that neither may

> sponsor, operate, advertise, or promote . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702. The prohibition on private persons is limited to any such activity conducted "pursuant to the law or compact of a governmental entity," *id.* § 3702(2), while the states are subject to an additional restriction: they may not "license[] or authorize by law

or compact" any such gambling activities, *id.* §§ 3702(1), 3701.

PASPA contains three relevant exceptions—a "grandfathering" clause that releases Nevada from PASPA's grip, *see id.* § 3704(a)(2), a clause that permitted New Jersey to license sports wagering in Atlantic City had it chosen to do so within one year of PASPA's enactment, *see id.* § 3704(a)(3), and a grandfathering provision permitting states like Delaware and Oregon to continue the limited "sports lotteries" that they had previously conducted, *see id.* § 3704(a)(1). PASPA provides for a private right of action "to enjoin a violation [of the law] . . . by the Attorney General or by a . . . sports organization . . . whose competitive game is alleged to be the basis of such violation." *Id.* § 3703.

Only one Court of Appeals has decided a case under PASPA—ours. In *Office of the Commissioner of Baseball v. Markell* we held that PASPA did not permit Delaware to license single-game betting because the relevant grandfathering provision for Delaware permitted only lotteries consisting of multi-game parlays on NFL teams. 579 F.3d 293, 304 (3d Cir. 2009). This is the first case addressing PASPA's constitutionality.

The Act's legislative history is sparse but mostly consistent with the foregoing. The Report of the Senate Judiciary Committee makes clear that PASPA's purpose is to "prohibit sports gambling conducted by, or authorized under the law of, any State or governmental entity" and to "stop the spread of State-sponsored sports gambling." Sen. Rep. 102248, at 4, *re-*

printed in 1992 U.S.C.C.A.N. 3553, 3555 ("Senate Report"). The Senate Report specifically notes legislators' concern with "State-sponsored" and "State-sanctioned" sports gambling. *Id.* at 3555.

The Senate Report catalogues what the Committee believed were some of the problems arising from sports gambling. Importantly, the Committee noted its concern for "the integrity of, and public confidence in, amateur and professional sports" and its concern that "[w]idespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think 'the fix was in' whenever their team failed to beat the point-spread." *Id.* at 3556. The Senate Report also stated its concurrence with the then-director of New Jersey's Division of Gaming Enforcement's statement that "most law enforcement professionals agree that legalization has a negligible impact on, and in some ways enhances, illegal markets." *Id.* at 3558. This is so because "many new gamblers will . . . inevitably . . . seek to move beyond lotteries to wagers with higher stakes and more serious consequences." *Id.*

The Senate Report also explains the Committee's conclusion that "[s]ports gambling is a national problem" because "[t]he moral erosion it produces cannot be limited geographically" given the thousands who earn a livelihood from professional sports and the millions who are fans of them, and because "[o]nce a State legalizes sports gambling, it will be extremely difficult for other States to resist the lure." *Id.* at 3556. Finally, it notes that PASPA exempts Nevada because the Committee did not wish to "threaten [Nevada's] economy," or of the three other states that had chosen in

the past to enact limited forms of sports gambling. *Id.* at 3559.

B. Sports Gambling in New Jersey Since PASPA Was Enacted

Although New Jersey in its discretion chose not to avail itself of PASPA's exemption within the one-year window, "[o]ver the course of the next two decades . . . the views of the New Jersey voters regarding sports wagering evolved." Br. of Appellants Sweeney, *et al.* 4. In 2010, the New Jersey Legislature held public hearings during which it heard testimony that regulated sports gambling would generate much-needed revenues for the State's casinos and racetracks, and during which legislators expressed a desire to "to stanch the sports-wagering black market flourishing within [New Jersey's] borders." Br. of Appellants Christie, *et al.* 13 ("N.J. Br."). The Legislature ultimately decided to hold a referendum which would result in an amendment to the State's Constitution permitting the Legislature to "authorize by law wagering. . . on the results of any professional, college, or amateur sport or athletic event." N.J. Const. Art. IV, § VII, ¶ 2 (D), (F). The measure was approved by the voters, and the Legislature later enacted the law that is now asserted to be in violation of PASPA—the "Sports Wagering Law," which permits State authorities to license sports gambling in casinos and racetracks and casinos to operate "sports pools." N.J.S.A. 5:12A-1 *et seq.*; *see also* N.J.A.C. § 13:69N-1.1 *et seq.* (regulations implementing the law).

II. PROCEDURAL HISTORY

The NBA, MLB, the National Collegiate Athletic Association ("NCAA"), the National Football League

("NFL"), and the National Hockey League ("NHL") (collectively, the "Leagues"), sued New Jersey Governor Chris Christie, New Jersey's Racing Commissioner, and New Jersey's Director of Gaming Enforcement (the "State" or "New Jersey"), under 28 U.S.C. § 2703, asserting that the Sports Wagering Law is invalidated by PASPA. The New Jersey Senate Majority Leader Stephen Sweeney and House Speaker Sheila Oliver intervened as defendants, alongside the New Jersey Thoroughbred Horsemen's Association, the owner of the Monmouth Park Racetrack, a business where sports gambling would occur under the Sports Wagering Law (the "NJTHA") (collectively, "Appellants").

The State moved to dismiss for lack of standing and the District Court ordered expedited discovery on that question. After the completion of discovery and oral arguments, the District Court concluded that the Leagues have standing. *Nat'l Collegiate Athletic Ass'n v. Christie*, No. 12-4947, 2012 WL 6698684 (D.N.J. Dec. 21, 2012) ("*NCAA I*").

With the constitutionality of PASPA then squarely at issue, the District Court invited the United States to intervene pursuant to 28 U.S.C. § 2403. The District Court ultimately upheld PASPA's constitutionality, granted summary judgment to the Leagues, and enjoined the Sports Wagering Law from going into effect. *Nat'l Collegiate Athletic Ass'n v. Christie*, __ F. Supp. 2d __, 2013 WL 772679 (D.N.J. Feb. 28, 2013) ("*NCAA II*"). This expedited appeal followed.

III. JURISDICTION: WHETHER THE LEAGUES HAVE STANDING

The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331, and we have appellate jurisdiction over its final judgment under § 1291. Our jurisdiction, however, is limited by the Constitution's "cases" and "controversies" requirement. U.S. CONST., art. III, § 2. To satisfy this jurisdictional limitation, the party invoking federal court authority must demonstrate that he or she has standing to bring the case.[1]

The Leagues argue they have standing because their own games are the subject of the Sports Wagering Law. They also contend that the law will increase the total amount of gambling on sports available, thereby souring the public's perception of the Leagues as people suspect that games are affected by individuals with a perhaps competing hidden monetary stake in their outcome. Appellants counter that the Leagues cannot show a concrete, non-speculative injury from any potential increase in *legal* gambling.

The District Court granted summary judgment to the Leagues, reasoning that *Markell* supports a holding that the Leagues have standing, and that reputational injury is a legally cognizable harm that may confer standing. It also found sufficient facts in the

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[1] The United States notes there may be questions as to whether the District Court's injunction is an appealable final order because it does not specify what steps the State must undertake to comply with the injunction, but we conclude that the injunction is an appealable final order because the merits opinion describes what the State must do refrain from licensing sports gambling. *See NCAA II*, 2013 WL 772679, at *25.

record to conclude that the Sports Wagering Law will result in an increase in fans' negative perceptions of the Leagues. We review *de novo* the legal conclusion that the Leagues have standing, and we review for clear error any factual findings underlying the District Court's determination. *Marion v. TDI Inc.*, 591 F.3d 137, 146 (3d Cir. 2010).

A. The Effect of *Markell*

Markell, like this case, was a lawsuit by the Leagues to stop a state from licensing single-game betting on the outcome of sporting events. In *Markell* we "beg[a]n [our analysis], as always, by considering whether we ha[d] jurisdiction to hear [the] appeal," and later concluded that we did have jurisdiction. 579 F.3d at 297, 300. But, contrary to the Leagues' suggestion, our analysis was limited to whether we had appellate jurisdiction under 28 U.S.C. § 1292(a). *See id.* We did not explicitly consider Article III standing, and a "drive-by jurisdictional ruling, in which jurisdiction has been assumed by the parties . . . does not create binding precedent." *United States v. Stoerr*, 695 F.3d 271, 277 n.5 (3d Cir. 2012) (internal quotation marks and alterations omitted). Therefore, we will not rely on *Markell* for our standing analysis.

B. Standing Law Generally

Under the familiar three-part test, to establish standing, a plaintiff must show (1) an "injury in fact," *i.e.*, an actual or imminently threatened injury that is "concrete and particularized" to the plaintiff; (2) causation, *i.e.*, traceability of the injury to the actions of the defendant; and (3) redressability of the injury by a favorable decision by the Court. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

Causation and redressability may be met when "a party . . . challenge[s] government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940-41 (D.C. Cir. 2004). Here, the Leagues do not purport to enjoin third parties from attempting to fix games. The Leagues have sued to block the Sports Wagering Law, which they assert will result in a taint upon their games, and is a law that by definition constitutes state action to license conduct that would not otherwise occur. Under the reasoning of *National Wrestling Coaches*, causation and redressability are thus satisfied, and all arguments implicitly aimed at those two prongs are suspect.

Accordingly, we focus on the injury-in-fact requirement, the "contours of [which], while not precisely defined, are very generous." *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982). Indeed, all that Article III requires is an identifiable trifle of injury, *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 n.14 (1973), which may exist if the plaintiff "has . . . a personal stake in the outcome of [the] litigation." *The Pitt News v. Fisher*, 215 F.3d 354, 360 (3d Cir. 2000); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992) (noting that to satisfy the injury-in-fact requirement the "injury must affect the plaintiff in a personal and individual way"). To meet this burden, the Leagues must present evidence "in the same way as [for] any other matter on which [they] bear[] the burden of proof." *Lujan*, 504 U.S. at 561.

C. Whether the Sports Wagering Law Causes the Leagues An Injury In Fact

As noted, the Leagues offer two independent bases for standing: that the Sports Wagering Law makes the Leagues' games the object of state-licensed gambling and that they will suffer reputational harm if such activity expands. We address each in turn.

1. The Leagues are essentially the object of the Sports Wagering Law

Injury in fact may be established when the plaintiff himself is the object of the action at issue. *Id.* Thus, the Leagues are correct that if the Sports Wagering Law is directed at them, the injury-in-fact requirement is satisfied.

Fairly read, however, the Sports Wagering Law does not directly regulate the Leagues, but instead regulates the activities that may occur at the State's casinos and racetracks. We thus hesitate to conclude that the Leagues may rely solely on the existence of the Sports Wagering Law to show injury. But that is not to say that we are glib with respect to one of the main purposes of the law: to use the Leagues' games for profit. *Cf. NFL v. Governor of Del.*, 435 F. Supp. 1372, 1378 (D. Del. 1972) (Stapleton, J.) (explaining that Delaware's sports lottery sought to use the NFL's "schedules, scores and public popularity" to "mak[e] profits [Delaware] [c]ould not make but for the existence of the NFL"). The Sports Wagering Law is thus, in a sense, as much directed at the Leagues' events as it is aimed at the casinos. This is not a generalized grievance like those asserted by environmental groups over regulation of wildlife in cases where the Supreme Court has found no standing, such as in

Lujan or *Summers*. The law here aims to license private individuals to cultivate the fruits of the Leagues' labor.

Appellants counter that the Leagues' interest in not seeing their games subject to wagering is a non-cognizable "claim for the loss of psychic satisfaction." N.J. Br. at 31 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998)). But the holding in *Steel Company* was that a claim for psychic satisfaction did not present a *redressable* injury. In that case, a private plaintiff sought a payment into the U.S. Treasury by a private company that had violated federal law, and asserted that such was a redressable injury because the plaintiff would feel "psychic satisfaction" in seeing the payment made. *See Steel Co.*, 523 U.S. at 107. The case is thus inapposite here, where redressability is established because the Leagues assert harm from the very government action they seek to enjoin—the enforcement of the Sports Wagering Law. Moreover, the Leagues do not assert merely psychic, but reputational harm, a very real and very redressable injury.

Appellants also argue that because the Leagues do not have a proprietary interest in the outcomes of their games they may not seek to prevent others from profiting from them. This contention relies on the holding in *NFL v. Governor of Delaware*, that a Delaware lottery based on the outcome of NFL games did not constitute a misappropriation of the NFL's property. 435 F. Supp. at 1378-79. But here the Leagues do not complain of an invasion of any proprietary interest, but only refer to the fact of appropriation of their labor to show that the Sports Wagering Law is directed at them.

2. Reputational Harm as Injury In Fact

The Leagues may also meet their burden of establishing injury from a law aimed at their games by proving that the activity sanctioned by that law threatens to cause them reputational harm amongst their fans and the public.

(a) Reputation Harm Is a Legally Cognizable Injury

As a matter of law, reputational harm is a cognizable injury in fact. The Supreme Court so held in *Meese v. Keene*, where it concluded that a senator who wished to screen films produced by a foreign company had standing to challenge a law requiring the identification of such films as foreign "political propaganda" because the label could harm his reputation with the public and hurt his chances at reelection. 481 U.S. 465, 473-74 (1987). Essentially, the senator challenged his unwanted association with an undesirable label. Our cases have also recognized that reputational harm is an injury sufficient to confer standing. *See, e.g.*, *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 542-43 (3d Cir. 2007) (concluding that an attorney has standing to challenge a public reprimand because the sanction "affect[s] [his] reputation"); *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (holding that a student had standing to challenge a rule requiring that he be identified as disabled because such label could sour the perception of him by "people who can affect his future and his livelihood").

The Leagues' claim of injury is identical to that of the plaintiffs in *Keene* and *Doe*: they are harmed by their unwanted association with an activity they (and

large portions of the public) disapprove of—gambling. Appellants do not dispute this legal premise, but attack the strength of the evidence that the Leagues have proffered to tie the Sports Wagering Law to the reputational harm they assert. These arguments overstate what the Leagues must show to demonstrate reputational harm in this context and, in any case, ignore the strength of the proffered evidence.

(b) The Evidence In the Record Supports the District Court's Conclusion that Reputational Harm Will Occur

To be sure, at the summary judgment stage, mere allegations of harm are insufficient and specific facts are required. *See Lujan*, 504 U.S. at 561. And a plaintiff's claim of fear of reputational harm must always be "based in reality." *Doe*, 199 F.3d at 153. But the "nature and extent of facts that must be averred" depends on the nature of the asserted injury. *Lujan*, 504 U.S. at 561-62. No one would doubt, for example, that an individual forced to wear a scarlet "A" on her clothing has standing to challenge that action based on reputational harm. Indeed, that was the import of our holding in *Doe* where, after discounting all of the evidence presented to prove that others' perception of the plaintiff as disabled could harm him, we concluded that his fear of reputational harm based on an unwanted and stigmatizing label was nevertheless based "in reality." 199 F.3d at 153. In *Keene*, by contrast, where the reputational harm from being associated with "foreign political propaganda" was not as intuitive, the Supreme Court held that an undisputed expert opinion that such labels may stigmatize individuals was sufficient to make the required injury-in-

fact showing. 481 U.S. at 490. This suggests a spectrum wherein the sufficiency of the showing that must be made to establish reputational harm depends on the circumstances of each case. Here, the reputational harm that results from increasingly associating the Leagues' games with gambling is fairly intuitive.

For one, the conclusion that there is a link between legalizing sports gambling and harm to the integrity of the Leagues' games has been reached by several Congresses that have passed laws addressing gambling and sports, *see, e.g.*, H.R. Rep. No. 88-1053 (1963) (noting that when gambling interests are involved, the "temptation to fix games has become very great," which in turn harms the honesty of the games); Senate Report at 3555 (noting that PASPA was necessary to "maintain the integrity of our national pastime"). It is, indeed, the specific conclusion reached by the Congress that enacted PASPA, as reflected by the statutory cause of action conferred to the Leagues to enforce the law when their individual games are the target of state-licensed sports wagering. *See* 28 U.S.C. § 3703. And, presumably, it has also been at least part of the conclusions of the various state legislatures that have blocked the practice throughout our history.

But even if polls like in *Keene* were always required in reputational harm cases, the Leagues have met that burden. The record is replete with evidence showing that being associated with gambling is stigmatizing, regardless of whether the gambling is legal or illegal. Before the District Court were studies showing that: (1) some fans from each League viewed gambling as a problem area for the Leagues, and some fans expressed their belief that game fixing most threatened the Leagues' integrity **[App. 1605-06]**; (2)

some fans did not want a professional sports franchise to open in Las Vegas, and some fans would be less likely to spend money on the Leagues if that occurred; and (3) a large number of fans oppose the expansion of legalized sports betting. [**2293-98.**] This more than suffices to meet the Leagues' evidentiary burden under *Keene* and *Doe*—being associated with gambling is undesirable and harmful to one's reputation.

Although the Leagues could end their injury in fact proffer there, they also set forth evidence establishing a clear link between the Sports Wagering Law and increased incentives for game-rigging. First, the State's own expert noted that state-licensing of sports gambling will result in an increase in the total amount of (legal plus illegal) gambling on sports. **[App. 325].** Second, a report by the National Gambling Impact Study Commission, prepared at the behest of Congress in 1999, explains that athletes are "often tempted to bet on contests in which they participate, undermining the integrity of sporting contests." App. 743. Third, there has been at least one instance of match-fixing for NCAA games as a result of wagers placed through legitimate channels, and several as a result of wagers placed in illegal markets for most of the Leagues, and NCAA players have affected or have been asked to affect the outcome of games "because of gambling debt." App. 2245. Thus, more legal gambling leads to more total gambling, which in turn leads to an increased incentive to fix or attempt to fix the Leagues' matches.

This evidence, together, permits the factual conclusion that being associated with gambling is a stigmatizing label and that, to the extent that the Sports

Wagering Law will increase the total amount of gambling as New Jersey's expert expects, it will increase some fans' "negative perceptions [of the Leagues] attributed to game fixing and gambling." *NCAA I*, 2013 WL 6698684, at *6. We discern no clear error in the District Court's factual conclusions as derived from these surveys and reports.[2]

3. Appellants' Counterarguments

Appellants posit that the Leagues cannot establish injury based on any stigma that may attach to wagering, because fans would not think negatively of the Leagues given that it is the State that is licensing the activity against the Leagues' wishes. But as then-Circuit Judge Scalia explained, an argument that the "public reaction [to] the alleged harm . . . is an irrational one . . . is irrelevant to the question of core, constitutional injury-in-fact, which requires no more than *de facto* causality." *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986).

We also find unpersuasive the contention that the increase in incentives to rig the outcome of the Leagues' games cannot give rise to standing because they depend on unknown actions of third parties. The

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[2] More fundamentally, it is clear to us that gambling and match-fixing scandals tend to tarnish the Leagues' reputations. Media reports to that effect abound. To take but one, after the Tim Donaghy NBA gambling and game-fixing scandal, commentators noted that "the integrity of the [NBA's] games just took a major hit." J.A. Adande, *Ref investigation only adds to bad perception of NBA*, ESPN.com, July 19, 2007, http://sports.espn.go.com/nba/columns/story?id=2943704. It is simply untenable to hold that the Leagues have not identified a trifle of reputational harm from an increase in even legal or licensed sports gambling.

Leagues do not seek to enjoin individuals from rigging games; they seek to enjoin New Jersey's law. That a third party's action may be necessary to complete the complained-of harm does not negate the existence of an injury in fact from the Sports Wagering Law or negate causation and redressability. "It is impossible to maintain . . . that there is no standing to sue regarding action of a defendant which harms the plaintiff only through the reaction of third persons. If that principle were true, it is difficult to see how libel actions or suits for inducing breach of contract could be brought in federal court. . . ." *Id.* Thus, "the traceability requirement [may be] met even where the conduct in question might not have been a proximate cause of the harm." *Edmonson v. Lincoln Nat'l Life Ins. Co.*, __ F.3d __, No. 12-1581, 2013 WL 4007553, *7 (3d Cir. Aug. 7, 2013) (citing *The Pitt News*, 215 F.3d at 360-61).[3]

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[3] Appellants rely almost exclusively on *Simon v. East Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), for the proposition that the reputational injury at issue here is insufficient because it "result[s] 'from the independent action of some third party not before the court.'" N.J. Br. at 23 (quoting *Simon*, 426 U.S. at 41-42). This argument greatly overstates the effect of *Simon*. There, a group of indigent individuals brought suit against the IRS, asserting that the IRS's tax designation of certain hospitals harmed them by making it less likely that the hospitals would provide them free services. The Supreme Court concluded that the plaintiffs lacked standing because it was "purely speculative whether the denials of services . . . fairly can be traced to [the IRS' actions] or instead result from decisions made by the hospitals without regard to the tax implications." *Simon*, 426 U.S. at 42-43. But here we are dealing with a law that licenses conduct that casinos could not otherwise undertake under the State's auspices, and thus the third party's actions are not

Appellants also assert that granting summary judgment to the Leagues was improper because the effect of the studies and opinion polls was disputed by Appellants' own evidence. In particular, they point to evidence that (1) the Leagues have been economically prospering despite pervasive unregulated sports gambling and state-licensed sports gambling in Nevada; and (2) some individuals would have no interest in the Leagues' product unless they had a monetary interest in the outcome of games. But these arguments, which sound more like an appeal to commonsense with which, no doubt, many will agree as a policy matter, do not legally deprive the Leagues of standing and are insufficient to raise a genuine issue of material fact.

A plaintiff does not lose standing to challenge an otherwise injurious action simply because he may also derive some benefit from it. Our standing analysis is not an accounting exercise and it does not require a decision on the merits. *See, e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006) (noting that "the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing"); *see also* 13A CHARLES A. WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. JURIS. 3d § 3531.4, 147 (3d ed. 2008). Nor must the Leagues construct counterfactuals analyzing whether they would have done better if PASPA had instituted a complete ban of state-licensed sports gambling or, conversely, worse if PASPA had not existed. And that fans may still buy tickets is not incon-

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truly independent of the State's conduct. *See Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 941.

sistent with the notion that the Leagues' esteem suffers in the eyes of fans, which requires the Leagues to take efforts to rehabilitate their image. That alone establishes injury in fact; that the Leagues may have been successful at rehabilitating their images does not deprive them of standing. *See, e.g.*, *Keene*, 481 U.S. at 475 ("[T]he need to take . . . affirmative steps to avoid the risk of harm to [one's] reputation constitutes a cognizable injury.").

As a last resort, Appellants question the Leagues' commitment to their own argument that state-licensed sports wagering harms them, noting that the Leagues hold events in jurisdictions, such as Canada and England, where gambling on sports is licensed, and that they promote and profit from products that are akin to gambling on sports, such as pay-to-play fantasy leagues. But standing is not defeated by a plaintiff's alleged unclean hands and does not require balancing the equities. That the Leagues may believe that holding events in Canada and England is not injurious to them does not negate that harm may arise from an expansion of sports wagering to the entire country. The same can be said of the Leagues' promotion of fantasy sports, even if we accept that these activities are akin to head-to-head gambling.[4] And, as

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[4] We note, however, the legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by the Sports Wagering Law. *See Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 1797648, at *9 (D.N.J. June 20, 2007) (holding that fantasy leagues that require an entry fee are not subject to anti-betting and wagering laws); *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86-87 (Nev. 1961) (holding that a "hole-in-one" contest that required an entry fee was a prize contest, not a wager).

even Appellants recognize, it is not the Leagues' subjective beliefs that control. *See Lujan*, 504 U.S. at 564.

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That the Leagues have standing to enforce a prohibition on state-licensed gambling on their athletic contests seems to us a straightforward conclusion, particularly given the proven stigmatizing effect of having sporting contests associated with gambling, a link that is confirmed by commonsense and Congress' own conclusions.[5]

IV. THE MERITS

We turn now to the merits. The centerpiece of Appellants and amici's attack on PASPA is that it impermissibly commandeers the states. But at least one party raises the spectre that PASPA is also beyond Congress' authority under the Commerce Clause of the U.S. Constitution. We thus examine first whether Congress may even regulate the activities that PASPA governs. Only after concluding that Congress may do so can we consider whether, in exercising its affirmative powers, Congress exceed a limitation imposed in the Constitution, such as by the anti-commandeering and equal sovereignty principles. *See,*

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[5] We also note that, although the United States' intervention does not always give us jurisdiction, a court may treat intervention as a separate suit over which it has jurisdiction, if the intervenor has standing, particularly when the intervenor enters the proceedings at an early stage. *See, e.g., Disability Advocates, Inc. v. New York Coal. For Assisted Living, Inc.*, 675 F.3d 149, 161 (2d Cir. 2012); *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965). Thus, the United States' intervention independently supports our jurisdiction.

e.g., *Reno v. Condon*, 528 U.S. 141, 148-49 (2000) (asking, first, whether a law was within Commerce Clause powers and, second, whether the law violated the Tenth Amendment).[6]

A. Whether PASPA is Within Congress' Commerce Clause Power

1. Modern Commerce Clause Law

Among Congress' enumerated powers in Article I is the ability to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., Art. I., § 8, cl. 3. As is well-known, since *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937), the Commerce Clause has been construed to give Congress "considerabl[e] . . . latitude in regulating conduct and transactions." *United States v. Morrison*, 529 U.S. 598, 608 (2000). For one, Congress may regulate an activity that "substantially affects interstate commerce" if it "arise[s] out of or [is] connected with a commercial transaction." *United States v. Lopez*, 514 U.S. 549, 559 (1995). By contrast, regulations of non-economic activity are disfavored. *Id.* at 567 (striking down a law regulating possession of weapons near schools); *see also Morrison*, 529 U.S. at 613 (invalidating a law regulating gender-motivated violence).

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[6] We review *de novo* a determination regarding PASPA's constitutionality, *Gov't of V.I. v. Steven*, 134 F.3d 526, 527 (3d Cir. 1998), and begin with the "time-honored presumption that [an act of Congress] is a constitutional exercise of legislative power." *Reno*, 528 U.S. at 148 (internal quotation marks omitted) (quoting *Close v. Glenwood Cemetery*, 107 U.S. 446, 475 (1883)).

2. Gambling and the Leagues' Contests, Considered Separately or Together, Substantially Affect Interstate Commerce

Guided by these principles, it is self-evident that the activity PASPA targets, state-licensed wagering on sports, may be regulated consistent with the Commerce Clause.

First, both wagering and national sports are economic activities. A wager is simply a contingent contract involving "two or more . . . parties, having mutual rights in respect to the money or other thing wagered." *Gibson*, 359 P.2d at 86; *see also* N.J. Stat. Ann. §§ 5:12-21 (defining gambling as engaging in a game "for money, property, checks, or any representative of value"). There can also be no doubt that the operations of the Leagues are economic activities, as they preside essentially over for-profit entertainment. *See, e.g.*, App. 1444 (NFL self-describing its "complex business model that includes a diverse range of revenue streams, which contribute . . . to company profitability").

Second, there can be no serious dispute that the professional and amateur sporting events at the heart of the Leagues' operations "substantially affect" interstate commerce. The Leagues are associations comprised of thousands of clubs and members, **[App. 105]**, which in turn govern the operations of thousands of sports teams organized across the United States, competing for fans and revenue across the country. "Thousands of Americans earn a . . . livelihood in professional sports. Tens of thousands of others participate in college sports." Senate Report at 3557. Indeed, some of the Leagues hold sporting

events abroad, affecting commerce with Foreign Nations.

Third, it immediately follows that placing wagers on sporting events also substantially affects interstate commerce. As New Jersey indicates, Americans gamble up to $500 billion on sports each year. **[App. 330-31].** And whatever effects gambling on sports may have on the games themselves, those effects will plainly transcend state boundaries and affect a fundamentally national industry. Accordingly, we have deferred to Congressional determinations that "gambling involves the use and has an effect upon interstate commerce." *United States v. Riehl*, 460 F.2d 454, 458 (3d Cir. 1972).

At bottom, it is clear that PASPA is aimed at an activity that is "quintessentially economic" and that has substantial effects on interstate commerce. *See Raich*, 545 U.S. at 19-20. Prohibiting the state licensing of this activity is thus a "rational . . . means of regulating commerce" in this area and within Congress' power under the Commerce Clause. *Id.* at 26.[7]

3. PASPA Does Not Unconstitutionally Regulate Purely Local Activities

Appellants nevertheless assert that PASPA is unconstitutional because it "reaches unlimited betting activity . . . that cannot possibly affect interstate commerce . . . [such as] a casual bet on a Giants-Jets football game between family members." Br. of NJTHA at

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[7] *But see Federal Baseball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200, 208-09 (1922) (describing MLB's business as "giving exhibitions of base ball, which are purely state affairs," and concluding that baseball is not in interstate commerce for purposes of the Sherman Antitrust Act).

34. Parsing words from the statute, they insist PASPA reaches these activities because it prohibits betting in "competitive games" involving "amateur or professional athletes." 28 U.S.C. § 3702. This argument is meritless.

For one, PASPA on its face does not reach the intrastate activities that Appellants contend it does. PASPA prohibits only gambling "schemes" and only those carried out "pursuant to law or compact." 28 U.S.C. § 3702. The activities described in Appellants' examples are nor carried out pursuant to state law, or pursuant to "a systemic plan; a connected or orderly arrangement . . . [or] [a]n artful plot or plan." Black's Law Dictionary (9th Ed. 2009) (defining "scheme").

Moreover, even entertaining that PASPA somehow reaches these activities, Congressional action over them is permissible if Congress has a "rational basis" for concluding that the activity in the aggregate has a substantial effect on interstate commerce. *Raich*, 545 U.S. at 22. The rule of an unbroken line from *Wickard v. Filburn*, 317 U.S. 111 (1942), to *Raich*—respectively upholding limitations on growing wheat at home and personal marijuana consumption—is that when it comes to legislating economic activity, Congress can regulate "even activity that is purely intrastate in character . . . where the activity, combined with like conduct by other similarly situated, affects commerce among the States or with foreign nations." *Nat'l League of Cities v. Usery*, 426 U.S. 833, 840 (1976), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (alterations omitted). And there can be no doubt that Congress had a rational basis to conclude

that the intrastate activities at issue substantially affect interstate commerce, given the reach of gambling, sports, and sports wagering into the far corners of the economies of the states, documented above.[8]

Appellants finally seek support in the Supreme Court's holding that the "individual mandate" of the Affordable Care Act is beyond Congress' power under the Commerce Clause. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). But the problem in *Sebelius* was that the *method* chosen to regulate (forcing into economic activity individuals previously not in the market for health insurance) was beyond Congress' power. Here, the method of regulation, banning an activity altogether (in this case the expansion of State-sponsored sports betting), is neither novel nor problematic. *See, e.g.*, *Raich*, 545 U.S. at 27.

B. Whether PASPA Impermissibly Commandeers the States

Having concluded that Congress may regulate sports wagering consistent with the Commerce

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[8] Moreover, if PASPA reaching activities that are purely intrastate in nature were constitutionally problematic, we would construe its language as not reaching such acts. After all, "[t]he cardinal principle of statutory construction is to save and not to destroy . . . . [A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." *Jones & Laughlin Steel*, 301 U.S. at 30. Appellants' reading of PASPA to reach casual bets between friends steamrolls that principle. At the very worst, we would leave for another day the question of whether PASPA may constitutionally be applied to such a local wager. Appellants today have not shown that "no set of circumstances exists under which the [challenged] Act would be valid." *CMR D.N. Corp. v. City of Phila.*, 703 F.3d 612, 623 (3d Cir. 2013) (alteration in original).

Clause, we turn to PASPA's operation in the case before us.

As noted, PASPA makes it "unlawful for a governmental entity to . . . authorize by law or compact" gambling on sports. 28 U.S.C. § 3702. This is classic preemption language that operates, via the Constitution's Supremacy Clause, *see* U.S. CONST., art. VI, cl. 2, to invalidate state laws that are contrary to the federal statute. *See, e.g., Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096, 2100-01, 2102 (2013) (explaining that the provision of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") that states a "'State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property' . . . preempts State laws related to a price, route, or service of any motor carrier with respect to the transportation of property" (quoting 49 U.S.C. § 14501(c)(1)). The Sports Wagering Law is precisely what PASPA says the states may not do—a purported authorization by law of sports wagering. It is therefore invalidated by PASPA.[9]

Appellants do not contest any of the foregoing, but argue instead that PASPA's operation over the Sports Wagering Law violates the "anti-commandeering" principle, which bars Congress from conscripting the states into doing the work of federal officials. The import of this argument, then, is that impermissible

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[9] This straightforward operation of the Supremacy Clause, which operates on states laws that are foreclosed by a standalone federal provision, is not to be confused with *field preemption* of sports wagering, a topic we discuss at part IV.B.2.d below.

anti-commandeering may occur even when all a federal law does is supersede state law via the Supremacy Clause. But the Supreme Court's anti-commandeering jurisprudence has never entertained this position, let alone accepted it.

1. The Anti-Commandeering Principle

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). And it is well-known that all powers not explicitly conferred to the federal government are reserved to the states, a maxim reflected in the text of the Tenth Amendment. U.S. CONST., amdt. X; *see also United States v. Darby*, 312 U.S. 100, 123-24 (1941) (describing this as a "truism" embodied by the Tenth Amendment).

Among the important corollaries that flow from the foregoing is that any law that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program" is beyond the inherent limitations on federal power within our dual system. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 283, 288 (1981). Stated differently, Congress "lacks the power directly to compel the States to require or prohibit" acts which Congress itself may require or prohibit. *New York v. United States*, 505 U.S. 144, 166, 180 (1992). The Supreme Court has struck down laws based on these principles on only two occasions, both distinguishable from PASPA.

(a) Permissible regulation in a preemptible field: *Hodel* and *FERC*

The first modern, relevant incarnation of the anti-commandeering principle appeared in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*. The law at issue there imposed federal standards for coal mining on certain surfaces and required any state that wished to "assume permanent regulatory authority over . . . surface coal mining operations" to "submit a proposed permanent program" to the Federal Government, which, among other things, required the "state legislature [to] enact[] laws implementing the environmental protection standards established by the [a]ct." *Hodel*, 452 U.S. at 271. If a particular state did *not* wish to implement the federal standards, the federal government would step in to do so. *Id.* at 272. The Supreme Court upheld the provisions, noting that they neither compelled the states to adopt the federal standards, nor required them "to expend any state funds," nor coerced them into "participat[ing] in the federal regulatory program in any manner whatsoever." *Id.* at 288. The Court further concluded that Congress could have chosen to completely preempt the field by simply assuming oversight of the regulations itself. *Id.* It thus held that the Tenth Amendment posed no obstacle to a system by which Congress "chose to allow the States a regulatory role." *Id.* at 290. As the Court later characterized *Hodel*, the scheme there did not violate the anti-commandeering principle because it "merely made compliance with federal standards a precondition to continued state regulation in an otherwise preempted field." *Printz v. United States*, 521 U.S. 898, 926 (1997).

The next year, in *F.E.R.C. v. Mississippi*, the Court upheld a provision *requiring* state utility regulatory commissions to "consider" whether to enact certain standards for energy efficiency but leaving to the states the ultimate choice of whether to adopt those standards or not. 456 U.S. 742, 746, 769-70 (1982). The Court upheld the law despite its outright commandeering of the state resources needed to consider and study the federal standards, because the law did not definitely require the enactment or implementation of federal standards. *Id.* at 764. The Court, noting that Congress had simply regulated where it could have "preempt[ed] the States entirely" but instead chose to leave some room for the states to maneuver, saw the case as "only one step beyond *Hodel*." *Id.*

(b) Permissible Prohibitions on State Action: *Baker* and *Reno*

In a different pair of anti-commandeering cases, the Court upheld affirmative prohibitions on state action that effectively invalidated contrary state laws and even required the states to enact new measures. First, in *South Carolina v. Baker*, the Supreme Court upheld the validity of laws that "directly regulated the States by prohibiting outright the issuance of bearer bonds." 485 U.S. 505, 511 (1988). These rules, which also applied to private debt issuers, required the states to "amend a substantial number of statutes in order to [comply]." *Id.* at 514. The Court concluded this result did not run afoul the Tenth Amendment because it did not "seek to control or influence the manner in which States regulate private parties" but was simply "an inevitable consequence of regulating a state activity," *id.* In subsequent cases, the Court explained that the regulation in *Baker* was permissible

because it simply "subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160.

Then, in *Reno v. Condon*, the Court unanimously rejected an anti-commandeering challenge to a law prohibiting states from disseminating personal information obtained by state departments of motor vehicles. South Carolina complained that the act required its employees to learn its provisions and expend resources to comply and, indeed, the federal law effectively blocked the operation of state laws governing the disclosure of that information. 528 U.S. at 150. The Court agreed "that the [act] will require time and effort on the part of state employees" but otherwise rejected the anti-commandeering challenge because, like the law in *Baker*, the law "d[id] not require the States in their sovereign capacity to regulate their own citizens[,] . . . d[id] not require the [State] Legislature[s] to enact any laws or regulations, and it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id.* at 151. Moreover, the law did not "seek to control[] or influence the manner in which States regulate private parties." *Id.* (citing *Baker*, 485 U.S. at 514-15).

(c) Impermissible Anti-Commandeering: *New York* and *Printz*

In contrast to the foregoing, the Court has twice struck down portions of a federal law on anti-commandeering grounds. The first was in *New York v. United States*, which dealt with a law meant to regulate and encourage the orderly disposal of low-level radioactive waste by the states. 505 U.S. at 149-54. The "most severe" aspect of the complex system of measures established by the law, referred to as the "take-title"

provision, provided that if a particular state had not been able to arrange for the disposal of the radioactive waste by a specified date, then that state would have to take title to the waste at the request of the waste's generator. *Id.* at 153-54 (citing 42 U.S.C. § 2021e(d)(2)(C)). The Court, based on the notion that "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,'" *id.* at 161 (quoting *Hodel*, 452 U.S. at 288) (alterations omitted), struck down the take-title provision because it did just that: compel the states to either enact a regulatory program, or expend resources in taking title to the waste. *Id.* at 176. The Court noted that Congress may enact measures to encourage the states to act and may "hav[e] state law pre-empted by federal regulation" but concluded that the take-title provision "crossed the line distinguishing encouragement from coercion." *Id.* at 167, 175. The Court also emphasized that the anti-commandeering principle was designed, in part, to stop Congress from blurring the line of accountability between federal and state officials and from skirting responsibility for its choices by foisting them on the states. *Id.* at 168.

The Court then applied these principles, in *Printz*, to invalidate the provisions of the Brady Act that required local authorities of certain states to run background checks on persons seeking to purchase guns. The Court held that Congress "may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program." 521 U.S. at 935. The Court was also troubled that these provisions required states to "absorb the financial

burden of implementing a federal regulatory program" and "tak[e] the blame for its . . . defects." *Id.* at 930.

To date, the schemes at issue in *New York* and *Printz* remain the only two that the Supreme Court has struck down under the anti-commandeering doctrine. Our Court has not yet had occasion to consider an anti-commandeering challenge.[10]

2. Whether PASPA Violates the Anti-Commandeering Principle

(a) Anti-Commandeering and the Supremacy Clause

Appellants' arguments that PASPA violates anti-commandeering principles run into an immediate problem: not a single case that we have reviewed involved a federal law that, like PASPA, simply operated to invalidate contrary state laws. It has thus never been the case that applying the Supremacy Clause to invalidate a state law contrary to federal proscriptions is tantamount to direct regulation over the states, to an invasion of their sovereignty, or to commandeering. Most of the foregoing cases involved Congress attempting to directly impose a federal scheme on state officials. If anything, the federal laws

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[10] Three other cases complete the constellation of the Supreme Court's modern anti-commandeering jurisprudence but deal with the applicability of federal labor laws to certain State employees. *See Nat'l League of Cities*, 426 U.S. at 883; *Garcia*, 469 U.S. at 528; *Gregory*, 501 U.S. at 452. These cases are of marginal relevance, so we do not elaborate on them at length. *See also Markell*, 579 F.3d at 303 (rejecting an argument that PASPA violates the sovereignty principles set forth in *Gregory*).

in *Reno* and *Baker* had the effect of invalidating certain contrary state laws by prohibiting state action, and both survived. Indeed, the Justices in both *New York* and *Printz* disclaimed any notion that the anti-commandeering principle somehow suspends the operation of the Supremacy Clause on otherwise valid laws. For example, in *Printz* the Court explained that our Constitutional structure requires "*all* state officials . . . to enact, enforce, and interpret state law in such a fashion as not to obstruct the operation of federal law, and the attendant reality [is] that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid." 521 U.S. at 913; *see also New York*, 505 U.S. at 162 (noting that the Commerce Clause permits Congress to "hav[e] state law pre-empted by federal [law]").

In light of the fact that the Supremacy Clause is the Constitution's answer to the problem that had made life difficult under the Articles of Confederation—the lack of a mechanism to enforce uniform national policies--accepting Appellants' position that a state's sovereignty is violated when it is precluded from following a policy different than that set forth by federal law (as New Jersey seeks to do with its Sports Wagering Law), would be revolutionary. *See* The Federalist No. 44, at 323 (James Madison) (B. Fletcher ed. 1996) (explaining that without the Supremacy Clause "all the authorities contained in the proposed Constitution . . . would have been annulled, and the new Congress would have been reduced to the same impotent condition with [the Articles of Confederation]").

And it is not hard to see why invalidating contrary state law does not implicate a state's sovereignty or otherwise commandeer the states. When Congress

passes a law that operates via the Supremacy Clause to invalidate contrary state laws, it is not telling the states what to do, it is barring them from doing something they want to do. Anti-commandeering challenges to statutes worded like PASPA have thus consistently failed. *See, e.g.*, *Kelley v. United States*, 69 F.3d 1503, 1510 (10th Cir. 1995) (upholding constitutionality of intrastate motor carrier statute, noting that it preempted state law and in doing so did not "compel[] the states to voluntarily act by enacting or administering a federal regulatory program"); *California Dump Truck Owners Ass'n v. Davis*, 172 F. Supp. 2d 1298, 1304 (E.D. Cal. 2001) (upholding constitutionality of FAAAA provision against an anti-commandeering challenge, noting that, unlike the laws in *New York* and *Printz*, the FAAAA provision, insofar as it merely preempts state law, "tell[s] states *what not to do*").[11]

To be sure, the Supremacy Clause elevates only laws that are otherwise within Congress' power to enact. *See, e.g.*, *New York*, 504 U.S. at 166 (noting that

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[11] As the Leagues note, numerous federal laws are framed to prohibit States from enacting or enforcing laws contrary to federal standards, and these regulations all enjoy different preemptive qualities. *See, e.g.*, *Farina v. Nokia*, 625 F.3d 97, 130 (3d Cir. 2010) (noting that statute which provides that "no State . . . shall have any authority to regulate the entry of or the rates charged by any commercial mobile service" is an express preemption provision); *MacDonald v. Monsanto*, 27 F.3d 1021, 1024 (5th Cir. 1994) (noting that law stating that a "State shall not impose or continue in effect any requirement for labeling or packing" pesticides is a preemption provision). The operation of these and other provisions is called into question by Appellants' view that the everyday operation of the Supremacy Clause raises anti-commandeering concerns.

Congress may not, consistent with the Commerce Clause, "regulate state governments' regulation of interstate commerce"). But we have held that Congress may prohibit state-licensed gambling consistent with the Commerce Clause. The argument that PASPA is beyond Congress' authority thus hinges on the notion that the invalidation of a state law pursuant to the Commerce Clause has the same "commandeering" effect as the federal laws struck down in *New York* and *Printz*. We turn now to this contention.

(b) PASPA is Unlike the Laws Struck Down in *New York* and *Printz*

Appellants' efforts to analogize PASPA to the provisions struck down in *New York* and *Printz* are unavailing. Unlike the problematic "take title" provision and the background check requirements, PASPA does not *require* or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law. They are not even required, like the states were in *F.E.R.C.*, to expend resources considering federal regulatory regimes, let alone to adopt them. Simply put, we discern in PASPA no "directives requiring the States to address particular problems" and no "command[s] to the States' officers . . . to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 935.

As the District Court correctly reasoned, the fact that PASPA sets forth a prohibition, while the *New York/Printz* regulations required affirmative action(s) on the part of the states, is of significance. Again, it is hard to see how Congress can "commandeer" a state, or how it can be found to regulate how a state regulates, if it does not require it to do anything at all. The

distinction is palpable from the Supreme Court's anti-commandeering cases themselves. State laws requiring affirmative acts may or may not be constitutional, *compare F.E.R.C.*, 456 U.S. at 761-63 (upholding statute because requirement that states expend resources considering federal standards was not commandeering) *with Printz*, 521 U.S. at 904-05 (finding requirement that states perform background checks unconstitutional). On the other hand, statutes prohibiting the states from taking certain actions have never been struck down even if they require the expenditure of some time and effort or the modification or invalidation of contrary state laws, *see Baker*, 485 U.S. at 515; *Reno*, 528 U.S. at 150. As the District Court carefully demonstrated, in all its anti-commandeering cases, the Supreme Court has been concerned with conscripting the states into affirmative action. *See NCAA II*, 2013 WL 772679, at *17.[12]

Recognizing the importance of the affirmative/negative command distinction, Appellants assert that PASPA does impose an affirmative requirement that the states act, by prohibiting them from repealing

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[12] The circuits that have considered anti-commandeering challenges, although addressing laws that are fundamentally different from PASPA, have similarly found this distinction significant. *See, e.g., Connecticut v. Physicians Health Servs. of Conn.*, 287 F.3d 110, 122 (2d Cir. 2002) (holding that a provision "limit[ing] states' power to sue as *parens patriae* . . . does not commandeer any branch of state government because it imposes no affirmative duty of any kind on them"); *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) (rejecting a commandeering challenge to a statute that did "not force state officials to do anything affirmative to implement" the statutory provision).

anti-sports wagering provisions.[13] We agree with Appellants that the affirmative act requirement, if not properly applied, may permit Congress to "accomplish exactly what the commandeering doctrine prohibits" by stopping the states from "repealing an existing law." *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). But we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering.

Under PASPA, "[i]t shall be unlawful for . . . a governmental entity to sponsor, operate, advertise, promote, *license, or authorize by law or compact*" a sports wagering scheme. 28 U.S.C. § 3702(1) (emphasis added). Nothing in these words *requires* that the states keep any law in place. All that is prohibited is the issuance of gambling "license[s]" or the affirmative "authoriz[ation] *by law*" of gambling schemes. Appellants contend that to the extent a state may choose to repeal an affirmative prohibition of sports gambling, that is the same as "authorizing" that activity,

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[13] Appellants also rely on *Coyle v. Smith*, where the Supreme Court struck down a law requiring Oklahoma to not change the location of its capital within seven years of its admission into the Union, 221 U.S. 559, 567 (1911), to lessen the significance of the "affirmative act" requirement we distill from the anti-commandeering cases. N.J. Br. 42, 44. But, despite the Supreme Court's citation to *Coyle* in *New York*, see 505 U.S. at 162, *Coyle* did not turn on impermissible commandeering. Instead, the Court struck down the statute as being traceable to no power granted by Congress in the Constitution, pertaining "purely to the internal polic[ies] of the state," and in violation of the principle that all states are admitted on equal footing into the Union. *Coyle*, 221 U.S. at 565, 579. PASPA does not raise any of these concerns, and neither do the modern anti-commandeering cases.

and therefore PASPA precludes repealing prohibitions on gambling just as it bars affirmatively licensing it. This argument is problematic in numerous respects. Most basically, it ignores that PASPA speaks only of "authorizing *by law*" a sports gambling scheme. We do not see how having *no law* in place governing sports wagering is the same as authorizing it by law. Second, the argument ignores that, in reality, the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people. Indeed, that the Legislature needed to enact the Sports Wagering Law itself belies any contention that the mere repeal of New Jersey's ban on sports gambling was sufficient to "authorize [it] by law." The amendment to New Jersey's Constitution itself did not purport to affirmatively authorize sports wagering but indeed only gave the Legislature the power to "authorize by law" such activities. N.J. Const. Art. IV, § VII, ¶ 2 (D), (F). Thus, the New Jersey Legislature itself saw a meaningful distinction between repealing the ban on sports wagering and authorizing it by law, undermining any contention that the amendment alone was sufficient to affirmatively authorize sports wagering—the Sports Wagering Law was required. *Cf. Hernandez v. Robles*, 855 N.E.2d 1, 5-6 (N.Y. 2006) (rejecting as "untenable" a construction of a domestic relation law, silent on the matter of the legality of same-sex marriages, as permitting such unions). Congress in PASPA itself saw a difference between general sports gambling activity and that which occurs under the auspices of state approval and authorization, and chose to reach private activity only

to the extent that it is conducted "pursuant to State law."

In short, Appellants' attempt to read into PASPA a requirement that the states must affirmatively keep a ban on sports gambling in their books rests on a false equivalence between repeal and authorization and reads the term "by law" out of the statute, ignoring the fundamental canon that, as between two plausible statutory constructions, we ought to prefer the one that does not raise a series of constitutional problems. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

To be sure, we take seriously the argument that many affirmative commands can be easily recast as prohibitions. For example, the background check rule of *Printz* could be recast as a requirement that the states *refrain* from issuing handgun permits *unless* background checks are conducted by their officials. The anti-commandeering principle may not be circumvented so easily. But the distinction between PASPA's blanket ban and *Printz*'s command, even if the latter is recast as a prohibition, remains. PASPA does not say to states "you may only license sports gambling if you conscript your officials into policing federal regulations" or otherwise impose any condition that the states carry out an affirmative act or implement a federal scheme before they may regulate or issue a license. It simply bars certain acts under any and all circumstances. And if affirmative commands may always be recast as prohibitions, then the prohibitions in myriads of routine federal laws may always be rephrased as affirmative commands. This shows that

Appellants' argument proves too much—the anti-commandeering cases, under that view, imperil a plethora of acts currently termed as prohibitions on the states.

And, to the extent we entertain the notion that PASPA's straightforward *prohibition* on action may be recast as presenting two *options*, these options are also quite unlike the two coercive choices available in *New York*—pass a law to deal with radioactive waste or expend resources in taking title to it. Neither of PASPA's two "choices" affirmatively requires the states to enact a law, and both choices leave much room for the states to make their own policy. Thus, under PASPA, on the one hand, a state may repeal its sports wagering ban, a move that will result in the expenditure of no resources or effort by any official. On the other hand, a state may choose to keep a complete ban on sports gambling, but it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be.

We agree that these are not easy choices. And it is perhaps true (although there is no textual or other support for the idea) that Congress may have suspected that most states would choose to keep an actual prohibition on sports gambling on the books, rather than permit that activity to go on unregulated. But the fact that Congress gave the states a hard or tempting choice does not mean that they were given no choice at all, or that the choices are otherwise unconstitutional. *See United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000) ("A hard choice is not the same as no choice."); *see also F.E.R.C.*, 456 U.S. at 766 (upholding a choice between expending state resources to consider federal standards or abandoning

field to federal regulation). And however hard the choice is in PASPA, it is nowhere near as coercive as the provisions in *New York* that punished states unwilling to enact a regulatory scheme and that did pass muster. *See New York*, 505 U.S. at 172, 173-74 (upholding a provision permitting states with waste disposal sites to charge more to non-compliant states and a statute taxing such states to the benefit of compliant states); *see also City of Abilene v. EPA*, 325 F.3d 657, 662 (5th Cir. 2003) (explaining that as long as "the alternative to implementing a federal regulatory program does not offend the Constitution's guarantees of federalism, the fact that the alternative is difficult, expensive or otherwise unappealing is insufficient to establish a Tenth Amendment violation"). PASPA imposes no punishment or punitive tax. We also disagree with the suggestion that the choices states face under PASPA are as coercive as the Medicaid expansion provision struck down in *Sebelius*, which threatened states unwilling to participate in a complex and extensive federal regulatory program with the loss of funding amounting to over ten percent of their overall budget. *Sebelius*, 132 S. Ct. at 2581.

Finally, we note that the attempt to equate a ban on state-sanctioned sports gambling to a plan by Congress to force the states into banning the activity altogether gives far too much credit to Congress' strong-arming powers. The attendant reality is that in the field of regulating certain activities, such as gambling, prostitution, and drug use, states have always gravitated towards prohibitions, regardless of Congress' efforts. Indeed, as noted, *all but one* state prohibited broad state-sponsored gambling at the time PASPA was enacted. Congress, by prohibiting state-licensing

schemes, may indeed have made it harder for states to turn their backs on the choices they previously made (although in PASPA it made it less hard for New Jersey), but that choice was already very hard, and very unlikely to be made to begin with (as New Jersey's history with the regulation of sports gambling also illustrates).

(c) PASPA as Regulating State Conduct—*Baker* and *Reno*

Additionally, PASPA is remarkably similar to the prohibitions on state action upheld in *Baker* and *Reno*. *Baker*'s regulations prohibited the states from issuing bearer bonds, which in turn required states to issue new regulations and invalidated old ones; *Reno*'s anti-disclosure provisions prohibited the states from disseminating certain information, necessitating the expenditure of resources to comply with the federally imposed prohibitions. To the extent PASPA makes it unattractive for states to repeal their anti-sports wagering laws, which in turn requires enforcement by states, the effort PASPA requires is simply that the states enforce the laws they choose to maintain, and is therefore plainly less intrusive than the laws in *Baker* and *Reno*. PASPA also has the effect, like the laws in those two cases, of rendering inoperative any contrary state laws.

We are not persuaded by Appellants' arguments that *Baker* and *Reno* are inapposite. They contend, first, that *Reno* is different because it involved regulation of the states in the same way as private parties. But that overstates the regulations at issue in *Reno*, which were directed at state DMVs and only incidentally prohibited private persons from further disseminating data they may obtain from the DMVs. *See*

528 U.S. at 144. Indeed, the *Reno* Court did "not address the question whether general applicability is a constitutional requirement for federal regulation of the States." *Id.* at 151. And, as mentioned, PASPA *does* operate on private individuals insofar as it prohibits them from engaging in state-sponsored gambling. But private individuals cannot be prohibited from issuing gambling licenses, because they have never been able to do so. Second, we find no basis to distinguish PASPA from the laws in *Reno* and *Baker* on the ground that the latter regulate the states solely as participants in the market. DMVs are uniquely state institutions; states thus obtain information through the DMVs not as participants in the market, but in their unique role as authorizers of commercial activity. PASPA is no different: it regulates the states' permit-issuing activities by prohibiting the issuance of the license altogether, as in *Baker*, where the state was essentially prohibited from issuing the bearer bond. Third, we decline to draw a distinction between PASPA and the laws at issue in *Reno* and *Baker* on the ground that PASPA involves a regulation of the states as states. The Supreme Court's anti-commandeering cases do not contemplate such distinction.[14]

Despite the fact that PASPA is very similar to the prohibition on state activity upheld unanimously in *Reno*, Appellants insist that certain statements in that opinion support its view that PASPA is unconstitutional. Appellants insist that under *Reno* a law is

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[14] And, arguably, the Supreme Court's Tenth Amendment jurisprudence cautions against drawing lines between activities that are "traditional" to state government and those that are not. *See Garcia*, 469 U.S. at 546 (calling such distinctions "unworkable").

unconstitutional if it requires the states to govern according to Congress' instructions or if it "influences" the ways in which the states regulate their own citizens. *See* N.J. Br. at 3, 18, 40, 42, 43, 45-46, 52. But no one contends that PASPA requires the states to enact any laws, and we have held that it also does not require states to maintain existing laws. And one line from *Reno*, that the law upheld there did not "control or influence the manner in which States regulated private parties," 528 U.S. at 142, cannot possibly bear the great weight that Appellants would hoist upon it. Most federal regulation inevitably influences the manner in which states regulate private parties. If that were enough to violate the anti-commandeering principle, then *Hodel* and *F.E.R.C.* were wrongly decided. Indeed, nowhere in *Reno* (or *Baker*, from where that line was quoted, *see id.* (quoting *Baker*, 485 U.S. at 514)), did the Court suggest that the absence of an attempt to influence how states regulate private parties was *required* to avoid violating the anti-commandeering principle.[15]

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[15] The parties spar over how the accountability concerns of anti-commandeering cases weigh here. But *New York* and *Printz* make clear that they are not implicated when Congress does not enlist the States in the implementation of a federal regulatory program. To strike down any law that may cause confusion as to whether a prohibition comes from the federal government or from a State's choice, before considering whether that law actually commandeers the States, is to put the cart before the horse. Indeed, the Supreme Court in *Reno* rejected the notion that simply raising the specter of accountability problems is enough to find an anti-commandeering violation. *See* 528 U.S. at 150-51.

(d) The Sports Wagering Law Conflicts With Federal Policy With Respect to Sports Gambling and is Therefore Preempted

Alternatively, to the extent PASPA coerces the states into keeping in place their sports-wagering bans, that coercion may be upheld as fitting into the exception drawn in anti-commandeering cases for laws that impose federal standards over conflicting state rules, in areas where Congress may otherwise preempt the field. Under this view, PASPA gives states the choice of either implementing a ban on sports gambling or of accepting complete deregulation of that field as per the federal standard. In *Hodel*, for example, the choice was implementing certain minimum-safety regulations or living in a world where the federal government enforced them.

PASPA makes clear that the federal policy with respect to sports gambling is that such activity should not occur under the auspices of a state license. As noted, PASPA prohibits individuals from engaging in a sports gambling scheme "pursuant to" state law. 28 U.S.C. § 3702(2). In other words, even if the provision that offends New Jersey, § 3702(1), were excised from PASPA, § 3702(2) would still plainly render the Sports Wagering Law inoperative by prohibiting private parties from engaging in gambling schemes pursuant to that authority. Thus, the federal policy with respect to sports wagering that § 3702(2) evinces is clear: to stop private parties from resorting to state law as a cover for gambling on sports. The Sports Wagering Law, in purporting to permit individuals to skirt § 3702(2), "authorizes [private parties] to engage in conduct that the federal [Act] forbids, [and therefore] it 'stands as an obstacle to the[] accomplishment

and execution of the full purposes and objectives of Congress,'" and accordingly conflicts with PASPA and is preempted. *See Mich. Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984).[16]

And there are other provisions in federal law, outside of PASPA, aimed at protecting the integrity of sports from the pall of wagering and that further demonstrate the federal policy of disfavoring sports-gambling. Indeed, in enacting PASPA, Congress explicitly noted that the law was "complementary to and consistent with [then] current Federal law" with respect to sports wagering. Senate Report at 3557. Congress has, for example, criminalized attempts to fix the outcome of a sporting event, 18 U.S.C. § 224, barred the placement of a sports gambling bet through wire communications to or from a place where such bets are illegal, 18 U.S.C. § 1084, and proscribed interstate transportation of means for carrying out sports lotteries, 18 U.S.C. §§ 1301, 1307(d).[17]

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[16] New Jersey asks that we ignore this argument because it was not raised by the United States below. But it is axiomatic that we may affirm on any ground apparent on the record, particularly when considering *de novo* the constitutionally of a Congressional enactment. The United States may decide not to advance particular arguments, but we may not, consistent with our duty to "save and not to destroy," *Jones & Laughlin Steel*, 301 U.S. at 30, use that choice to declare unconstitutional an act of Congress. The same may be said of arguments that the United States and the Leagues' reading of PASPA has changed throughout the litigation and should therefore be discounted, *see, e.g.*, Oral Arg. Tr. 71:14-19 (June 26, 2013).

[17] Appellants point to a statement in the Senate Report wherein the Committee notes that, according to the Congres-

Appellants contend that Congress has not preempted state law but instead incorporated it to the extent certain prohibitions are tied to whatever is legal under state law. But PASPA itself is not tied to state law. Rather, PASPA prohibits engaging in schemes *pursuant to* state law. 28 U.S.C. § 3702(2). To be sure, some of the other cited provisions tie themselves to state law—but the Tenth Amendment does not require that Congress leave *less* room for the states to govern. *Cf. F.E.R.C.*, 456 U.S. at 764 (noting that there is no Tenth Amendment problem if Congress "allow[s] the States to enter the field if they promulgate[] regulations consistent with federal standards").

Appellants also attempt to distinguish PASPA from other preemptive schemes. They note that preemptive schemes normally either impose an affirmative federal standard or a rule of non-regulation, and that PASPA does not impose an affirmative federal standard and cannot possibly be construed as a law aimed at permitting unregulated sports gambling

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sional Budget Office, there would be "no cost to the federal government . . . from enactment of this bill," Senate Report at 3561, as proof that PASPA seeks to foist upon the states the responsibility for banning sports wagering. But this statement is taken out of context. The import of it was that PASPA would require no "direct spending or receipts" of funds, *id.*, but the Senate Report itself makes clear that the Justice Department would use already-earmarked funds to permit it to "enforce the law without utilizing criminal prosecutions of State officials," *id.* at 3557. For a report issued well before the opinions in *New York* and *Printz* delineated the contours of modern anti-commandeering jurisprudence, the Senate Report is remarkably clear in that it seeks to increase the federal government's role in policing sports wagering, not pass that obligation along to the states.

because its aim was to stop the spread of sports gambling. But, PASPA's text and legislative history reflect that its goal is more modest—to ban gambling pursuant to a state scheme—because Congress was concerned that state-sponsored gambling carried with it a label of legitimacy that would make the activity appealing. Whatever else we may think were Congress' secret intentions in enacting PASPA, nothing we know of speaks to a desire to ban all sports wagering. Moreover, the argument once again ignores that PASPA does impose a federal standard directly on private individuals, telling them, essentially, thou shall not engage in sports wagering under the auspices of a state-issued license. *See* 28 U.S.C. § 3702(2).

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We hold that PASPA does not violate the anti-commandeering doctrine. Although many of the principles set forth in anti-commandeering cases may abstractly be used to support Appellants' position, doing so would result in an undue expansion of the anti-commandeering doctrine. If attempting to influence the way states govern private parties, or requiring the expenditure of resources, or giving the states hard choices, were enough to violate anti-commandeering principles, then what of *Hodel*, *F.E.R.C.*, *Baker*, and *Reno*? The overriding of contrary state law via the Supremacy Clause may result in influencing or changing state policies, but there is nothing in the anti-commandeering cases to suggest that the principle is meant to apply when a law merely operates via the Supremacy Clause to invalidate contrary state action. Missing here is an affirmative command that the states enact or carry out a federal scheme and PASPA is simply nothing like the only two laws struck down

under the anti-commandeering principle. Several important points buttress our conclusion: first, PASPA operates simply as a law of pre-emption, via the Supremacy Clause; second, PASPA thus only *stops* the states from doing something; and, finally, PASPA's policy of stopping state-sanctioned sports gambling is confirmed by the independent prohibition on private activity pursuant to any such law. When so understood, it is clear that PASPA does not commandeer the states.

C. Whether PASPA Violates the Equal Sovereignty of the States

Finally, we address Appellants' contention that PASPA violates the equal sovereignty of the states by singling out Nevada for preferential treatment and allowing only that State to maintain broad state-sponsored sports gambling.

1. Equal Sovereignty Cases—*Northwest Austin* and *Shelby County*

The centerpiece of Appellants' equal sovereignty argument is the Supreme Court's analysis of the Voting Rights Act of 1965 ("VRA") in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), and *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013). In *Northwest Austin*, the Supreme Court was asked by a small utility district to rule on the constitutionality of § 5 of the VRA, which required the district to obtain preclearance from federal authorities before it could make changes to the manner in which its board was elected. The district had sought an exemption from the preclearance requirement, but the district court held that only states are eligible for such "bailouts" under the Act.

Nw. Austin, 557 U.S. at 196-97. On direct appeal, the Supreme Court stated that § 5 raises "federalism concerns" because it "differentiates between the States." *Id.* at 203. The Court also explained that "[d]istinctions [between the states] can be justified in some cases" such as when Congress enacts "remedies for *local* evils which have subsequently appeared." *Id.* (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966)). However, the Court did not ultimately decide whether § 5 violated the equal sovereignty principle, invoking instead the canon of constitutional avoidance to construe the VRA's bailout provision to permit the district to obtain an exemption. *Id.* at 205.

In *Shelby County*, when asked to revisit the constitutionality of § 5, the Court reiterated the "basic principles" of equal sovereignty set forth in *Northwest Austin* and invalidated § 4(b) of the VRA, which set forth a formula used to determine what jurisdictions are covered by § 5 preclearance. 133 S. Ct. at 2622, 2630-31. Nevertheless, § 5 once more survived despite the expressed equal sovereignty concerns. *Id.* at 2631.

Appellants ask that we leverage these statements to strike down all of PASPA because it permits Nevada to license sports gambling. We decline to do so. First, the VRA is fundamentally different from PASPA. It represents, as the Supreme Court explained, "an uncommon exercise of congressional power" in an area "the Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections." *Shelby County*, 133 S. Ct. at 2623, 2624. The regulation of gambling via the Commerce Clause is thus not of the same nature as the regulation of elections pursuant to the Reconstruction

Amendments. Indeed, while the guarantee of uniformity in treatment amongst the states cabins some of Congress' powers, *see, e.g.*, U.S. CONST., art. I., § 8, cl. 1 (requiring uniformity in duties and imposts); *id.* § 9, cl. 6 (requiring uniformity in regulation of state ports), no such guarantee limits the Commerce Clause. This only makes sense: Congress' exercises of Commerce Clause authority are aimed at matters of national concern and finding national solutions will necessarily affect states differently; accordingly, the Commerce Clause, "[u]nlike other powers of [C]ongress[,] . . . does not require geographic uniformity." *Morgan v. Virginia*, 328 U.S. 373, 388 (1946) (Frankfurter, J., concurring).

Second, New Jersey would have us hold that laws treating states differently can "only" survive if they are meant to "remedy local evils" in a manner that is "sufficiently related to the problem that it targets." N.J. Br. at 55. This position is overly broad in that it requires the existence of a one-size-fits-all test for equal sovereignty analysis, which, as the foregoing shows, is a perilous proposition in the context of the Commerce Clause. And *Northwest Austin*'s statement that equal sovereignty may yield when local evils appear was made immediately after the statement that regulatory "[d]istinctions can be justified in *some* cases." 557 U.S. at 203 (emphasis added). Thus, local evils appear to be but *one* of the types of cases in which a departure from the equal sovereignty principle is permitted.

Third, there is nothing in *Shelby County* to indicate that the equal sovereignty principle is meant to apply with the same force outside the context of "sensitive areas of state and local policymaking." *Shelby*

County, 133 S. Ct. at 2624. We "had best respect what the [Court's] majority says rather than read between the lines. . . . If the Justices are pulling our leg, let them say so." *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437, 448 (7th Cir. 1992).

Fourth, even accepting that the equal sovereignty principle applies in the same manner in the context of Commerce Clause legislation, we have no trouble concluding that PASPA passes muster. Appellants' argument that PASPA's exemption does not properly remedy local evils because it "target[ed] the States in which legal sports wagering was absent," N.J. Br. at 56 (emphasis omitted), again distorts PASPA's purpose as being to wipe out sports gambling altogether. When the true purpose is considered—to stop the *spread* of *state-sanctioned* sports gambling—it is clear that regulating states in which sports-wagering already existed would have been irrational. Targeting only states where the practice did not exist is thus more than sufficiently related to the problem, it is *precisely tailored* to address the problem. If anything, Appellants' quarrel seems to be with PASPA's actual goal rather than with the manner in which it operates.

Finally, Appellants ignore another feature that distinguishes PASPA from the VRA—that far from singling out a handful of states for disfavored treatment, PASPA treats *more favorably* a *single* state. Indeed, it is noteworthy that Appellants do not ask us to invalidate § 3704(a)(2), the Nevada grandfathering provision that supposedly creates the equal sovereignty problem. Instead, we are asked to strike down § 3702, PASPA's general prohibition on state-licensed sports gambling. Appellants do not explain why, if PASPA's preferential treatment of Nevada violates

the equal-sovereignty doctrine, the solution is not to strike down only that exemption. The remedy New Jersey seeks—a complete invalidation of PASPA—does far more violence to the statute, and would be a particularly odd result given the law's purpose of curtailing state-licensed gambling on sports. That New Jersey seeks Nevada's preferential treatment, and not a complete ban on the preferences, undermines Appellants' invocation of the equal sovereignty doctrine.

2. Grandfathering Clause Cases

Appellants also argue that PASPA's exemption for Nevada is invalid under the Supreme Court's analysis in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), and *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1981), of grandfathering provisions in economic legislation. But in both cases the Supreme Court *upheld* the provisions: in *Dukes*, an ordinance that banned push cart vendors from New Orleans' historic district, but grandfathered those of a certain vintage, 427 U.S. at 305; in *Clover Leaf*, a statute banning the sale of milk in non-recyclable containers but grandfathering non-recyclable paper containers, 449 U.S. at 469.

Two cases upholding economic ordinances aimed at private parties have little to say about state sovereignty. While Appellants contend that *Dukes* and *Clover Leaf Creamery* support their position because they upheld *temporary* grandfathering clauses, there was no indication in either case that the clauses upheld were indeed temporary, that the legislatures were obligated to rescind them in the future, or even that the supposedly temporal quality of the laws was the basis of the Court's holdings, other than a statement in passing in *Dukes* that the legislature had chosen to

"initially" target only a particular class of products. 427 U.S. at 305.[18]

Appellants note that there is no case where a court has "permitted a grandfathering rationale to serve as a justification for violating the fundamental principle of equal sovereignty." N.J. Br. at 59. But it is not hard to see why this is the case: only two Supreme Court cases in modern times have applied the equal sovereignty principle.[19]

V. CONCLUSION

If baseball is a game of inches, constitutional adjudication may be described as a matter of degrees. The questions we have addressed are in many ways *sui generis*. Neither the standing nor the merits is-

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[18] Nor does our decision in *Delaware River Basin Commission v. Bucks County Water & Sewer Authority* support the notion that permanent grandfathering clauses are invalid, given that in that case we simply remanded for development of a record as to why the law at issue contained a grandfathering provision. 641 F.2d 1087, 1096-98 (3d Cir. 1981). PASPA's legislative history is clear as to the purpose behind its own exemptions, and thus survives *Delaware River Basin*.

[19] Appellants also rely on the so-called "equal footing" principle, the notion that Congress may not burden a new state's entry into the Union by disfavoring them over other states in support of their attack on Nevada's exemption. *See, e.g., Escanaba & Lake Mich. Transp. v. Chicago*, 107 U.S. 678, 689 (1883) (explaining that whatever restriction may have been imposed over Illinois' ability to regulate the operation of bridges over the Chicago River, such restrictions disappeared once Illinois was admitted into the Union as a state); *Coyle*, 221 U.S. at 567 (holding that Congress may not require Oklahoma to not change its capital as a condition of admission into the Union). But PASPA does not speak to conditions of admission into the Union.

sues we have tackled permit an easy solution by resorting to a controlling case that provides a definitive "Eureka!" moment. Our role thus is to distill an answer from precedent and the principles embodied therein. But we are confident that our adjudication of this dispute and our resolution of its merits leave us well within the strict bounds set forth by the Constitution and preserves intact the state-federal balance of power.

Having examined the difficult legal issues raised by the parties, we hold that nothing in PASPA violates the U.S. Constitution. The law neither exceeds Congress' enumerated powers nor violates any principle of federalism implicit in the Tenth Amendment or anywhere else in our Constitutional structure. The heart of Appellants' constitutional attack on PASPA is their reliance on two doctrines that—while of undeniable importance—have each only been used to strike down notably intrusive and, indeed, extraordinary federal laws. Extending these principles as Appellants propose would result in significant changes to the day-to-day operation of the Supremacy Clause in our constitutional structure. Moreover, we see much daylight between the exceedingly intrusive statutes invalidated in the anti-commandeering cases and PASPA's much more straightforward mechanism of stopping the states from lending their imprimatur to gambling on sports.

New Jersey and any other state that may wish to legalize gambling on sports within their borders are not left without redress. Just as PASPA once gave New Jersey preferential treatment in the context of gambling on sports, Congress may again choose to do

so or, more broadly, may choose to undo PASPA altogether. It is not our place to usurp Congress' role simply because PASPA may have become an unpopular law. The forty-nine states that do not enjoy PASPA's solicitude may easily invoke Congress' authority should they so desire.

The District Court's judgment is AFFIRMED.

VANASKIE, Circuit Judge, concurring in part and dissenting in part.

I agree with my colleagues that the Leagues have standing to challenge New Jersey's Sports Wagering Law, N.J. Stat. Ann. § 5:12A-2, and that the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3702, does not violate the principle of "equal sovereignty." I therefore join parts III and IV.C of the majority's decision in full. I also agree that, ordinarily, Congress has the authority to regulate gambling pursuant to the Commerce Clause, and thus I join part IV.A of the majority opinion as well. Yet, PASPA is no ordinary federal statute that directly regulates interstate commerce or activities substantially affecting such commerce. Instead, PASPA prohibits states from authorizing sports gambling and thereby directs how *states* must treat such activity. Indeed, according to my colleagues, PASPA essentially gives the states the choice of allowing totally unregulated betting on sporting events or prohibiting all such gambling. Because this congressional directive violates the principles of federalism as articulated by the Supreme Court in *United States v. New York*, 505 U.S. 142 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), I respectfully dissent from that part of the majority's opinion that upholds PASPA as a constitutional exercise of congressional authority.

I.

I agree with my colleagues that an appropriate starting point for addressing Appellants' claims is *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). In *Hodel*, the Court reviewed the

constitutionality of the federal Surface Mining Control and Reclamation Act, a comprehensive statutory scheme designed to regulate against the harmful effects of surface coal mining. *Id.* at 268. The act permitted states that wished to exercise permanent regulatory authority over surface coal mining to submit plans that met federal standards for federal approval. *Id.* at 271. In addition, the federal government created a federal enforcement program for states that did not obtain federal approval for state plans. *Id.* at 272. Applying the framework set forth in the since-overruled case, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Court concluded that the act did not regulate "'States as States'" because the challenged provisions governed only private individuals' and business' activities and because "the States are not compelled to enforce the . . . standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Id.* at 287-88. The Court further explained that

> [i]f a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.

Id. at 288. Even post-*Garcia*, the Court has explained that the act at issue in *Hodel* presented no Tenth

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Id. at 288. Even post-*Garcia*, the Court has explained that the act at issue in *Hodel* presented no Tenth

Amendment problem "because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." *Printz*, 521 U.S. at 926.

As the majority points out, a year later, in *FERC v. Mississippi*, 456 U.S. 742 (1982), the Court upheld the constitutionality of two titles of the Public Utility Regulatory Policies Act ("PURPA"), which directed state regulatory authorities to "consider" certain standards and approaches to regulate energy and prescribed certain procedures, but did not require the state authorities to adopt or implement specified standards. *Id.* at 745-50. As in *Hodel*, the Court observed that Congress had authority to preempt the field at issue—in *FERC*'s case, energy regulation. *Id.* at 765. The Court explained:

> PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards. While the condition here is affirmative in nature—that is, it directs the States to entertain proposals—nothing in this Court's cases suggests that the nature of the condition makes it a constitutionally improper one. There is nothing in PURPA "directly compelling" the States to enact a legislative program. In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' "separate and independent existence," *Lane County v. Oregon*, 7

> Wall. 71, 76, 19 L.Ed. 101 (1869); *Coyle v. Oklahoma*, 221 U.S. 559, 580, 31 S.Ct. 688, 695, 55 L.Ed. 853 (1911), and do not impair the ability of the States "to function effectively in a federal system." *Fry v. United States*, 421 U.S., at 547, n.7, 95 S.Ct., at 1795, n.7; *National League of Cities v. Usery*, 426 U.S., at 852, 96 S.Ct., at 2474. To the contrary, they offer the States a vehicle for remaining active in an area of overriding concern.

Id. at 765-66.

Subsequently, the Supreme Court struck down provisions in two cases based on violations of federalism principles. At issue in the first case, *New York*, was a federal statute that intended to incentivize "States to provide for the disposal of low level radioactive waste generated within their borders." *New York*, 505 U.S. at 170. As "an alternative to regulating pursuant to Congress' direction," one of the "incentives" provided states the "option of taking title to and possession of the low level radioactive waste . . . and becoming liable for all damages waste generators suffer[ed] as a result of the State's failure to do so promptly." *Id.* at 174-75. At the outset, the Court characterized the issue before it as "concern[ing] the circumstances under which Congress may use the State as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *Id.* at 161.

The Court in *New York* held the "take title" provision unconstitutional because it "'commandeer[ed] the

legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'" in violation of the principles of federalism. *Id.* at 176 (quoting *Hodel*, 452 U.S. at 288). The Court explained that "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, *it lacks the power directly to compel the States to require or prohibit those acts.*" *Id.* at 166 (emphasis added). It further elaborated that "[t]he allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; *it does not authorize Congress to regulate state governments' regulation of interstate commerce.*" *Id.* (emphasis added).

Second, in *Printz*, the Court reviewed a temporary federal statutory provision that required certain state law enforcement officers to conduct background checks on potential handgun purchasers as part of a federal regulatory scheme. *Printz*, 521 U.S. at 903-04. Observing that "'[t]he Federal Government may not compel the States to enact or administer a federal regulatory program,'" *id.* at 933 (quoting *New York*, 505 U.S. at 188), the Court held that "Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Id.* at 935. The Court further explained that Congress categorically "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.*

Later, in *Reno v. Condon*, 528 U.S. 141 (2000), a case the majority regards as "remarkably similar" to the matter *sub judice*, (Maj. Op. 43), a unanimous Court held that the Driver's Privacy Protection Act

("DPPA"), a generally applicable law which regulates the disclosure and resale by states and private persons of personal information contained in state department of motor vehicle records, "did not run afoul of the federalism principles enunciated in *New York* . . . and *Printz*." *Id.* at 143, 146, 151. After first determining that the DPPA was a proper exercise of congressional authority under the Commerce Clause, the Court rejected South Carolina's argument that the act violated federalism principles because it would "require time and effort on the part of state employees." *Id.* at 148, 150. Finding *New York* and *Printz* inapplicable, the Court relied instead on *South Carolina v. Baker*, 485 U.S. 505 (1988),[1] which "upheld a statute that prohibited States from issuing unregistered bonds because the law 'regulate[d] state activities,' rather than 'seeking[ing] to control or influence the manner in which States regulate private parties.'" *Reno*, 528 U.S. at 150 (quoting *Baker*, 485 U.S. at 514-15).[2] The Court further explained:

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[1] The majority also characterizes Baker as "remarkably similar" to PASPA's prohibition of state action. (Maj. Op. 43.)

[2] In Baker, the Court observed:

> The [intervenor] nonetheless contends that § 310 has commandeered the state legislative and administrative process because many state legislatures had to amend a substantial number of statutes in order to issue bonds in registered form and because state officials had to devote substantial effort to determine how best to implement a registered bond system. Such "commandeering" is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that

> The DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.

Id. at 151.

Most recently, in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), the Court struck down, as violative of the Spending Clause, a provision in the Patient Protection and Affordable Care Act ("ACA") that would have withheld federal Medicaid grants to states unless they expanded their Medicaid eligibility requirements in accordance with conditions in the ACA. *Id.* at 2581-82, 2606-07 (plurality). Quoting *New York*, Chief Justice Roberts, writing for a three-justice plurality, observed that "'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.'" *Id.* at 2602 (quoting *New York*, 505 U.S. at 162). The plurality then explained that, based on that principle, *New York* and *Printz* had struck down federal statutes that "commandeer[ed] a State's legislative or administrative apparatus for federal purposes." *Id.* The plurality also noted that, within the authority of the Spending Clause, Congress may not create "inducements to exert a power akin to undue influence" where

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> activity is a commonplace that presents no constitutional defect.

Baker, 485 U.S. at 514-15.

"pressure [would] turn[] into compulsion." *Id.* (internal quotations omitted). Recognizing that "'[t]he Constitution simply does not give Congress the authority to require the States to regulate,'" the plurality observed that "[t]hat is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system of its own." *Id.* (quoting *New York*, 505 U.S. at 178). The plurality ultimately concluded that the Medicaid conditions were unduly coercive and reiterated that "Congress may not simply 'conscript state [agencies] into the national bureaucratic army.'" *Id.* at 2604, 2606-07 (quoting *FERC*, 456 U.S. at 775 (O'Connor, J., concurring in judgment in part and dissenting in part)).

While Chief Justice Roberts' opinion concerning the Medicaid expansion provisions in *Sebelius* garnered the signatures of only three justices, the four dissenting justices also invoked the federalism principles of *New York* in concluding that the funding conditions in the Medicaid expansion impermissibly compelled states to govern as directed by Congress by coercing states' participation in the expanded program. *Id.* at 2660-62 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Thus, seven justices found the Medicaid expansion unconstitutional, citing the federalism principles articulated in *New York* as part of the basis for their conclusion. Importantly, the seven-justice rejection of the Medicaid expansion based, in part, on *New York*, represents a clear signal from the Court that the principles enunciated in *New York* are not limited to a narrow class of cases in which Congress specifically directs a state legislature to affirmatively enact legislation. *Cf. United States v. Richardson*, 658 F.3d 333, 340 (3d Cir. 2011) (observing that even if not

binding due to the votes of a splintered Court, "the collective view of [a majority of] justices is, of course, persuasive authority").

II.

New York and *Printz* clearly established that the federal government cannot direct state legislatures to enact legislation and state officials to implement federal policy. It is true that the two particular statutes under review in those cases involved congressional commands that states affirmatively enact legislation, *see New York*, 505 U.S. at 176-77, or affirmatively enforce a federal regulatory scheme, *see Printz*, 521 U.S. at 935. Nothing in *New York* or *Printz*, however, limited the principles of federalism upon which those cases relied to situations in which Congress directed affirmative activity on the part of the states. Rather, the general principle articulated by the Court in *New York* was that

> even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require *or prohibit those acts*. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; *it does not authorize Congress to regulate state governments' regulation of interstate commerce*.

New York, 505 U.S. at 166 (emphasis added) (citations omitted). Here, it cannot be disputed that PASPA "regulate[s] state governments' regulation of interstate commerce." *See id.* States regulate gambling, in

part, by licensing or authorizing such activity. By prohibiting states from licensing or authorizing sports gambling, PASPA dictates the manner in which states must regulate interstate commerce and thus contravenes the principles of federalism set forth in *New York* and *Printz*.[3]

If the objective of the federal government is to require states to regulate in a manner that effectuates federal policy, any distinction between a federal directive that commands states to take affirmative action and one that prohibits states from exercising their sovereignty is illusory. Whether stated as a command to engage in specific action or as a prohibition against specific action, the federal government's interference with a state's sovereign autonomy is the same. Moreover, the recognition of such a distinction is untenable, as affirmative commands to engage in certain conduct can be rephrased as a prohibition against not engaging in that conduct. Surely the structure of Our Federalism does not turn on the phraseology used by Congress in commanding the states how to regulate.

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[3] I agree with my colleagues that Congress has the authority under the Commerce Clause to ban gambling on sporting events, and that such a ban could include state-licensed gambling. I part company with my colleagues because that is not what PASPA does. Instead, PASPA conscripts the states as foot soldiers to implement a congressional policy choice that wagering on sporting events should be prohibited to the greatest extent practicable. Contrary to the majority's view, the Supremacy Clause simply does not give Congress the power to tell the states what they can and cannot do in the absence of a validly-enacted federal regulatory or deregulatory scheme. As explained at pages 13-14, *infra*, there is no federal regulatory or deregulatory scheme on the matter of sports wagering. Instead, there is the congressional directive that states not allow it.

An interpretation of federalism principles that permits congressional negative commands to state governments will eviscerate the constitutional lines drawn in *New York* and *Printz* that recognized the limit to Congress's power to compel state instrumentalities to carry out federal policy.

In addition, PASPA implicates the political accountability concerns voiced by the Supreme Court in *New York* and *Printz*. In *New York*, the Court observed that when the federal government preempts an area with a federal law to impose its view on an issue, it "makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *New York*, 505 U.S. at 168. In contrast, the Court explained, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169. The Court also recognized in *Printz* that in situations where Congress compels state officials to "implement[] a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes" and that states "are . . . put in the position of taking the blame for [the federal program's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930. Although PASPA does not "direct[] the States to regulate," *New York*, 505 U.S. at 169, or "implement[] a federal regulatory program," *Printz*, 521 U.S. at 930, its prohibition on state authorization and licensing of

sports gambling similarly diminishes the accountability of federal officials at the expense of state officials. Instead of directly regulating or banning sports gambling, Congress passed the responsibility to the states, which, under PASPA, may not authorize or issue state licenses for such activities. New Jersey law regulates games of chance, *see* N.J. Stat. Ann. § 5:8-1, *et seq.*, state lotteries, *see id.* § 5:9-1, *et seq.*, and casino gambling within the state, *see id.* § 5:12-1, *et seq.* As a result, it would be natural for New Jersey citizens to believe that state law governs sports gambling as well. That belief would be further supported by the fact that the voters of New Jersey recently passed a state constitutional amendment permitting sports gambling and their representatives in the state legislature subsequently enacted the Sports Wagering Law, at issue here, to regulate such activity. When New Jersey fails to authorize or license sports gambling, its citizens will understandably blame state officials even though state regulation of gambling has become a puppet of the federal government, whose strings are in reality pulled (or cut) by PASPA. States can authorize and regulate some forms of gambling, e.g., lotteries and casinos, but not other forms of gambling to implement policy choices made by Congress. Thus, accountability concerns arising from PASPA's restraint on state regulation also counsel in favor of concluding that it violates principles of federalism.

I do not suggest that the federal government may not prohibit certain actions by state governments—indeed it can. If Congress identifies a problem that falls within its realm of authority, it may provide a federal solution directly itself or properly incentivize states to

regulate or comply with federal standards. For example, if Congress chooses to regulate (or deregulate) directly, it may require states to refrain from enacting their own regulations that, in Congress's judgment, would thwart its policy objectives. Illustrating this point, the Supreme Court held in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), that the federal Airline Deregulation Act, which "prohibit[ed] the States from enforcing any law 'relating to rates, routes, or services' of any air carrier" preempted guidelines regarding fair advertising set forth by an organization of state attorneys general. *Id.* at 378-79, 391. There, as the Court explained, the purpose of the federal prohibition against further state regulation was "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Id.* at 378. Thus, a state law contrary to a federal regulatory or deregulatory scheme is void under the Supremacy Clause.[4]

Unlike in *Morales* and other preemption cases in which federal legislation limits the actions of state governments, in this case, there is no federal scheme regulating or deregulating sports gambling by which to preempt state regulation. PASPA provides no federal regulatory standards or requirements of its own. Instead, it simply prohibits states from "sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or

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[4] Significantly, the majority opinion does not cite any case that sustained a federal statute that purported to regulate the states under the Commerce Clause where there was no underlying federal scheme of regulation or deregulation. In this sense, PASPA stands alone in telling the states that they may not regulate an aspect of interstate commerce that Congress believes should be prohibited.

authoriz[ing]" gambling on sports. 28 U.S.C. § 3702(1). And, PASPA certainly cannot be said to be a deregulatory measure, as its purpose was to stem the spread of state-sponsored sports gambling, not let it go unregulated.[5] *See* S. Rep. No. 102-248, at 3 (1991) ("The purpose of S. 474 is to prohibit sports gambling conducted by, or authorized under the law of, any State or other governmental entity."); *id.* at 4 ("Senate bill 474 serves an important public purpose, to stop the spread of State-sponsored sports gambling . . . .").

Moreover, contrary to the majority opinion's suggestion, other federal statutes relating to sports gambling do not aggregate to form the foundation of a federal regulatory scheme that can be interpreted as preempting state regulation of sports gambling. First, Section 1084 of Title 18 of the United States Code makes it a federal crime to use wire communications to transmit sports bets in interstate commerce unless the transmission is from and to a state where sports betting is legal. *See* 18 U.S.C. § 1084(a)-(b). Thus, under that section, state law, rather than federal law, determines whether the specified conduct falls within the criminal statute.[6] Second, another federal law prohibits any "scheme . . . to influence . . . by bribery

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[5] The majority reasons that PASPA does not commandeer the states in battling sports gambling because the states retain the choice of repealing their laws outlawing such activity, observing that PASPA does not "require[] that the states keep any law in place." (Maj. Op. at 39.) Contrary to the majority's supposition, it certainly is open to debate whether a state's repeal of a ban on sports gambling would be akin to that state's "authorizing" gambling on sporting events, action that PASPA explicitly forecloses.

[6] Accordingly, if a state repealed an existing ban on wagering on sporting events, federal law would not be implicated.

any sporting contest." *Id.* § 224(a). But, that same section expressly indicates that it "shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operations to the exclusion of any State," and further disavows any attempt to preempt otherwise valid state laws. *Id.* § 224(b). A third federal statute carves out an exception to the general federal prohibition against transporting or mailing material and broadcasting information relating to lotteries for those conducted or authorized by states. *Id.* § 1307(a)-(b). That exception, however, does not pertain to the transportation or mailing of "equipment, tickets, or material" for sports lotteries. *Id.* § 1307(b), (d). Thus, while state sports lotteries violate § 1307, that section does not provide a basis for inferring that it, together with PAPSA, provides a federal regulatory scheme that preempts state regulation of sports gambling by private parties.[7] Further indicating federal deference to state laws on the subject, a fourth federal statute makes it a crime to transport wagering paraphernalia in interstate commerce but does not apply to betting materials to be used on sporting events in states where such betting is legal. *Id.* § 1953(a)-(b). As a result, the federal prohibition of state-authorized sports gambling does not emanate from a federal regulatory scheme that expressly or implicitly preempts state regulation that

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[7] PASPA only extends its prohibition to private persons to the extent persons "sponsor, operate, advertise, or promote [sports gambling] pursuant to the law or compact of a governmental entity." 28 U.S.C. § 3702(2). Because the federal statute applies only to persons who act pursuant to state law, it cannot be said to directly regulate persons.

would conflict with federal policy. Instead, PASPA attempts to implement federal policy by telling the states that they may not regulate an otherwise unregulated activity. The Constitution affords Congress no such power. *See New York*, 505 U.S. at 178 ("The Constitution . . . gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly . . . .").

In addition to preempting state regulation with federal regulation, in some circumstances, Congress may regulate states directly as part of a generally applicable law. *See, e.g.*, *New York*, 505 U.S. at 160 (collecting cases). That is what Congress did with the DPPA, which the Court expressly found in *Reno* to be generally applicable. *See Reno*, 528 U.S. at 151 ("[W]e need not address the question whether general applicability is a constitutional requirement for federal regulation of the States, because the DPPA is generally applicable. The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information . . . ."). Yet, unlike the DPPA in *Reno*, but like the act in *New York*, PASPA is not an example of a generally applicable law that subjects states to the same federal regulation as private parties. *See New York*, 505 U.S. at 160 ("This litigation presents no occasion to apply or revisit the holdings of . . . cases [concerning generally applicable laws], as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties."). In addition to its restrictions on actions by state governments relating to sports gam-

bling, PASPA also forbids "a person to sponsor, operate, advertise, or promote" sports gambling if done "*pursuant to the law or compact of a governmental entity*." 18 U.S.C. § 3702(2) (emphasis added); *see also supra* note 2. Thus, PASPA's reach to private parties is predicated on a state's authorization of sponsorship, operation, advertisement, or promotion of sports gambling pursuant to state law.[8] Accordingly, PASPA cannot be said to "subject[] . . . States[s] to the same legislation applicable to private parties," *New York*, 505 U.S. at 160, for state law determines whether § 3702(2) reaches any particular individual.

Nor does *Reno* stand more generally for the proposition that a violation of "anti-commandeering" federalism principles occurs only when Congress requires affirmative activity by state governments. It is true that in upholding the DPPA, the Court noted that it "d[id] not require the South Carolina Legislature to enact any laws or regulations, and it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Reno*, 528 U.S. at 151. Read in context, however, that statement does not suggest that the principles of federalism articulated in *New York* and *Printz* are limited only to situations in which Congress compels states to enact laws or enforce federal regulation. The two sentences preceding that statement make that clear. First, the

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[8] According to the majority, a state would presumably not run afoul of PASPA if it merely refused to prohibit sports gambling. The resulting unregulated market, however, portends grave consequences for which state officials would be held accountable, even though it would be federal policy that prohibits the states from taking effective measures to regulate and police this activity. In this sense, PASPA is indeed coercive.

Court recognized that "the DPPA d[id] not require the States in their sovereign capacity to regulate their own citizens." *Id.* But here, PASPA *does* "require states in their sovereign capacity to regulate their own citizens," *id.*, because it dictates *how* they must regulate sports gambling. Pursuant to PASPA, states may not "sponsor, operate, advertise, promote, license, or authorize" such activity, 28 U.S.C. § 3702(1). Thus, states must govern accordingly, even if that means by refraining from providing a regulatory scheme that governs sports gambling.

Second, the Court explained in *Reno* that, "[t]he DPPA regulates the States *as owners* of data bases" of personal information in motor vehicle records. *Reno*, 528 U.S. at 151 (emphasis added). The fact that the DPPA regulated states as "suppliers to the market for motor vehicle information," *id.*, clearly indicates that the Court viewed the DPPA as direct congressional regulation of interstate commerce, *id.* at 148 (recognizing that motor vehicle information, in the context of the DPPA, is "an article of commerce"), rather than a federal requirement for the states to regulate such activity, *see New York*, 505 U.S. at 166 ("The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."). Although the Court declined to find that *New York* and *Printz* governed the DPPA merely because it would "require time and effort on the part of state employees," it clarified that federally mandated action by states to comply with federal regulations is not necessarily fatal to a federal law that "'regulate[s] state activities,' rather than 'seek[ing] to control or

influence the manner in which States regulate private parties.'" *Reno*, 528 U.S. at 150 (quoting *Baker*, 485 U.S. at 514-15) (second alteration in original).

The direct federal regulation of interstate commerce under the DPPA obviously distinguishes *Reno* from *New York* and *Printz*, where the federal statutes at issue in those cases required states to enact legislation and enforce federal policy, respectively. But it also distinguishes *Reno* from this case. As the Court recognized, "[t]he DPPA establishe[d] a regulatory scheme." *Reno*, 528 U.S. at 144, 148, 151. As discussed above, however, PASPA is not itself a regulatory scheme, nor does it combine with several other scattered statutes in the criminal code to create a federal regulatory scheme. And while Congress could have regulated sports gambling directly under the Commerce Clause, just as it regulated motor vehicle information under the DPPA, it did not. Instead, it chose to set federal parameters as to how states may regulate sports gambling. As a result, any reliance on *Reno* to uphold PASPA is misplaced.

Hodel and *FERC* also provide no support for upholding PASPA. In *Hodel*, the statute at issue permitted states to submit a state regulatory plan for federal approval if they wished to regulate surface coal mining; if states did not seek or obtain approval, then a federal enforcement program would take effect. *Hodel*, 452 U.S. at 271-72. The Court determined that the federal statute did not "commandeer[] the legislative process of the States" because states had a choice about whether to implement regulation that conformed to federal standards or let the federal government bear the burden of regulation. *Id.* at 288; *see also Printz*, 521 U.S. at 925-26 ("In *Hodel* . . . we concluded

that the Surface Mining Control and Reclamation Act of 1977 did not present [a Tenth Amendment] problem . . . because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." (citation omitted)). If PASPA provided a similar choice to states—to either implement state regulation of sports gambling that met federal standards or allow federal regulation to take effect—then perhaps it would pass constitutional muster. But it does not. Therefore *Hodel* is inapplicable to the case at hand.

In addition, in upholding Titles I and III of PURPA in *FERC*, the Court focused on the fact that those titles merely required that states "*consider* the suggested federal standards" as a condition to continued state regulation. *FERC*, 456 U.S. at 765; *see also id.* at 765-66 ("In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' separate and independent existence, and do not impair the ability of the States to function effectively in a federal system." (citations omitted) (internal quotation marks omitted)). Here, PASPA does not provide suggested federal standards and approaches that states must consider in their regulation of sports gambling. Rather, PASPA strips any regulatory choice from state governments.[9] Furthermore, while the PURPA titles

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[9] The majority asserts that the two "choices" presented to a state by PASPA to "repeal its sports wagering ban [or] to keep a complete ban on sports wagering" — "leave much room for the states to make their own policy." (Maj. Op. at 41.) Even if the majority's reading of PASPA as affording these choices is correct, I fail to discern the "room" that is accorded the states to make

in *FERC* did "not involve the compelled exercise of Mississippi's sovereign powers," *id.* at 769, PASPA does indeed suffer from the obverse of such a constitutional defect: it prohibits the exercise of states' sovereign powers. *FERC* is thus distinguishable and inapposite.

Finally, as recognized by the majority, our decision in *Office of the Commissioner of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009), does not bind us to reject a challenge to PASPA on federalism grounds. In that case, we determined that a statutory phrase concerning the extent to which states grandfathered under PASPA could operate certain types of sports gambling was unambiguous. *Id.* at 302-03. As a result of the unambiguous language in PASPA, "we f[ou]nd unpersuasive Delaware's argument that its sovereign status requires that it be permitted to implement its proposed betting scheme." *Id.* at 303. That finding, however, related to our conclusion that PASPA gave clear notice of its "'alter[ation] [of] the usual constitutional balance' with respect to sports wagering," and thus satisfied the requirement of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *See Markell*, 579 F.3d at 303. Yet, here, we are not dealing with a question of which sovereign—state or federal—has the authority under either the "usual" or "altered" constitutional balance to regulate sports gambling. Congress does have the authority to regulate sports gambling when it does so itself. In this case, however, we are faced with the issue of whether Congress has

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their own policy on sports wagering. It seems to me that the only choice is to allow for completely unregulated sports wagering (a result that Congress certainly did not intend to foster), or to ban sports wagering completely.

the authority to regulate how states regulate sports gambling. Thus, our rejection of Delaware's "sovereign status" argument has no bearing on the issue before us. Furthermore, *Markell* provides no guidance in this case, because there we addressed only the meaning of the statutory exception to PASPA relating to grandfathered states found at 28 U.S.C. § 3704(a)(1). *Markell*, 579 F.3d. at 300-01. We did not pass upon the issue of whether Congress may constitutionally restrict how states can regulate under § 3702(1).

In sum, no case law supports permitting Congress to achieve federal policy objectives by dictating how states regulate sports gambling. Instead of directly regulating state activities or interstate commerce, PASPA "seek[s] to control or influence the manner in which States regulate private parties," a distinction the Supreme Court has recognized as significant. *See Reno*, 528 U.S. at 150 (internal quotation marks omitted) ("In *Baker*, we upheld a statute that prohibited States from issuing unregistered bonds because the law 'regulate[d] state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'" (quoting *Baker*, 485 U.S. at 51415)); *see also New York*, 505 U.S at 166 ("The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.").

Moreover, no legal principle exists for finding a distinction between the federal government compelling state governments to exercise their sovereignty to enact or enforce laws on the one hand, and restricting

state governments from exercising their sovereignty to enact or enforce laws on the other. In both scenarios the federal government is regulating how *states* regulate. If Congress identifies a problem involving or affecting interstate commerce and wishes to provide a policy solution, it may regulate the commercial activity itself, *see New York*, 505 U.S. at 166, and may even regulate state activity that involves interstate commerce, *see Reno*, 528 U.S. at 150-51; *Baker*, 485 U.S. at 514. In addition, Congress may provide states a choice about whether to implement state regulations consistent with federal standards or let federal regulation preempt state law, *see Hodel*, 452 U.S. at 288, and may require states to "consider" federal standards or approaches to regulation in deciding how to regulate in a preemptible area, *see FERC*, 456 U.S. at 765-66. Furthermore, Congress may "encourage a State to regulate in a particular way," *New York*, 505 U.S. at 166,—even in areas outside the scope of Congress's Article I, § 8 powers—by "attach[ing] conditions on the receipt of federal funds," *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). But, what Congress may not do is "regulate state governments' regulation." *See New York*, 505 U.S. at 166. Whether commanding the use of state machinery to regulate or commanding the nonuse of state machinery to regulate, the Supreme Court "has been explicit" that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162. Because that is exactly what PASPA does here, I conclude it violates the principles of federalism articulated in *New York* and *Printz*. Therefore, I would reverse the District Court's order granting summary judgment for Plaintiffs and vacate the permanent injunction.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-4546, 14-4568, and 14-4569

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission; NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC; NEW JERSEY SPORTS & EXPOSITION AUTHORITY

STEPHEN M. SWEENEY, President of the New Jersey Senate; VINCENT PRIETO, Speaker of the New Jersey General Assembly
(Intervenors in District Court)

Governor of New Jersey; David L. Rebuck;
Frank Zanzuccki,
Appellants in No. 14-1546

Stephen M. Sweeney, President of the New Jersey
Senate Vincent Prieto, Speaker of the New Jersey
General Assembly;
Appellants in No. 14-4568

New Jersey Thoroughbred Horsemen's
Association, Inc.,
Appellant in No. 14-4569

On Appeal from the United States District Court
for the District of New Jersey

(District Court No.: 3-14-cv-06450)

ORDER SUR PETITIONS
FOR REHEARING EN BANC

Present: AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, KRAUSE, RENDELL, and BARRY,*
Circuit Judges

A majority of the active judges having voted for rehearing en banc in the above captioned cases, it is ordered that the petitions for rehearing are

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* The Honorable Marjorie O. Rendell and Honorable Maryanne Trump Barry will participate as members of the en banc court pursuant to 3d. Cir. I.O.P. 9.6.4.

GRANTED. The Clerk of this Court shall list the case for rehearing en banc at the convenience of the Court. The opinion and judgment entered August 25, 2015 are hereby vacated.

BY THE COURT,

s/ Marjorie O. Rendell
Circuit Judge

Dated: October 14, 2015
cc: all counsel of record

APPENDIX H

U.S. Constitution, Amendment X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 3701 provides:

§ 3701. Definitions

For purposes of this chapter—

(1) the term "amateur sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),

(3) the term "professional sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

28 U.S.C. § 3702 provides:

§ 3702. Unlawful sports gambling

It shall be unlawful for—

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3703 provides:

§ 3703. Injunctions

A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.

28 U.S.C. § 3704 provides:

§ 3704. Applicability

(a) Section 3702 shall not apply to—

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that—

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

(4) parimutuel animal racing or jai-alai games.

(b) Except as provided in subsection (a), section 3702 shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

New Jersey Statutes (N.J. Stat.) § 5:12A-1 provides:

§ 5:12A-1. Definitions relative to sports wagering

As used in this act:

"casino" means a licensed casino or gambling house located in Atlantic City at which casino gambling is conducted pursuant to the provisions of P.L.1977, c.110 (C.5:12-1 et seq.);

"Casino Control Commission" means the commission established pursuant to section 50 of P.L.1977, c.110 (C.5:12-50);

"collegiate sport or athletic event" means a sport or athletic event offered or sponsored by or played in connection with a public or private institution that offers educational services beyond the secondary level;

"division" means the Division of Gaming Enforcement established pursuant to section 55 of P.L.1977, c.110 (C.5:12-55);

"operator" means a casino or a racetrack which has elected to operate a sports pool, either independently or jointly;

"professional sport or athletic event" means an event at which two or more persons participate in sports or athletic events and receive compensation in excess of actual expenses for their participation in such event;

"prohibited sports event" means any collegiate sport or athletic event that takes place in New Jersey or a sport or athletic event in which any New Jersey

college team participates regardless of where the event takes place;

"racetrack" means the physical facility where a permit holder conducts a horse race meeting with parimutuel wagering under a license by the racing commission pursuant to P.L.1940, c.17 (C.5:5-22 et seq.), and includes the site of any former racetrack;

"racing commission" means the New Jersey Racing Commission established by section 1 of P.L.1940, c.17 (C.5:5-22);

"sports event" means any professional sport or athletic event and any collegiate sport or athletic event, except a prohibited sports event;

"sports pool" means the business of accepting wagers on any sports event by any system or method of wagering; and

"sports wagering lounge" means an area wherein a sports pool is operated.

N.J. Stat. § 5:12A-2 provides:

§ 5:12A-2. Casino, racetrack may operate sports pool; severability

a. In addition to casino games permitted pursuant to the provisions of P.L.1977, c.110 (C.5:12-1 et seq.), a casino may operate a sports pool upon the approval of the division and in accordance with the provisions of this act and applicable regulations promulgated pursuant to this act. In addition to the conduct of parimutuel wagering on horse races under regulation by the racing commission pursuant to chapter 5 of Title 5 of the Revised Statutes, a racetrack may operate

a sports pool upon the approval of the division and the racing commission and in accordance with the provisions of this act and applicable regulations promulgated pursuant to this act. Upon approval of the division and racing commission, a casino and a racetrack in this State may enter into an agreement to jointly operate a sports pool at the racetrack, in accordance with the provisions of this act and applicable regulations promulgated pursuant to this act.

With regard to this act, P.L.2011, c.231 (C.5:12A-1 et al.), the duties specified in section 63 of P.L.1977, c.110 (C.5:12-63) of the Casino Control Commission shall apply to the extent not inconsistent with the provisions of this act. In addition to the duties specified in section 76 of P.L.1977, c.110 (C.5:12-76), the division shall hear and decide promptly and in reasonable order all applications for a license to operate a sports pool, shall have the general responsibility for the implementation of this act and shall have all other duties specified in that section with regard to the operation of a sports pool.

The license to operate a sports pool shall be in addition to any other license required to be issued pursuant to P.L.1977, c.110 (C.5:12-1 et seq.) to operate a casino or pursuant to P.L.1940, c.17 (C.5:5-22 et seq.) to conduct horse racing. No license to operate a sports pool shall be issued by the division to any entity unless it has established its financial stability, integrity and responsibility and its good character, honesty and integrity. No license to operate a sports pool shall be issued by the division to any entity which is disqualified under the criteria of section 86 of P.L.1977, c.110 (C.5:12-86).

No later than five years after the date of the issuance of a license and every five years thereafter or within such lesser periods as the division may direct, a licensee shall submit to the division such documentation or information as the division may by regulation require, to demonstrate to the satisfaction of the director of the division that the licensee continues to meet the requirements of the law and regulations.

b. A sports pool shall be operated in a sports wagering lounge located at a casino or racetrack. A sports wagering lounge may be located at a casino simulcasting facility. The lounge shall conform to all requirements concerning square footage, design, equipment, security measures and related matters which the division shall by regulation prescribe. The space required for the establishment of a lounge shall not reduce the space authorized for casino gaming activities as specified in section 83 of P.L.1977, c.110 (C.5:12-83).

c. The operator of a sports pool shall establish or display the odds at which wagers may be placed on sports events.

d. An operator shall accept wagers on sports events from persons physically present in the sports wagering lounge. A person placing a wager shall be at least 21 years of age.

e. An operator shall not admit into the sports wagering lounge, or accept wagers from, any person whose name appears on the exclusion list maintained by the division pursuant to section 71 of P.L.1977, c.110 (C.5:12-71) or on any self-exclusion list maintained by the division pursuant to sections 1 and 2 of

P.L.2001, c.39 (C.5:12-71.2 and C.5:12-71.3, respectively). Sections 1 and 2 of P.L.2002, c.89 (C.5:5-65.1 and C.5:5-65.2, respectively), shall apply to the conduct of sports wagering under this act.

f. The holder of a license to operate a sports pool may contract with an entity to conduct that operation, in accordance with the regulations of the division. That entity shall obtain a license as a casino service industry enterprise prior to the execution of any such contract, and such license shall be issued pursuant to the provisions of P.L.1977, c.110 (C.5:12-1 et seq.) and in accordance with the regulations promulgated by the division in consultation with the commission.

g. If any provision of this act, P.L.2011, c.231 (C.5:12A-1 et al.), or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

N.J. Stat. § 5:12A-3 provides:

§ 5:12A-3. Employees, licensed, registered

a. All persons employed directly in wagering-related activities conducted within a casino or a racetrack in a sports wagering lounge shall be licensed as a casino key employee or registered as a casino employee, as determined by the commission, pursuant to the provisions of P.L.1977, c.110 (C.5:12-1 et seq.). All other employees who are working in the sports wagering lounge may be required to be registered, if appropriate, in accordance with regulations of the division promulgated in consultation with the commission.

b. Each operator of a sports pool shall designate one or more casino key employees who shall be responsible for the operation of the sports pool. At least one such casino key employee shall be on the premises whenever sports wagering is conducted.

N.J. Stat. § 5:12A-4 provides:

§ 5:12A-4. Authority of division to regulate

Except as otherwise provided by this act, the division shall have the authority to regulate sports pools and the conduct of sports wagering under this act to the same extent that the division regulates other casino games. No casino or racetrack shall be authorized to operate a sports pool unless it has produced information, documentation, and assurances concerning its financial background and resources, including cash reserves, that are sufficient to demonstrate that it has the financial stability, integrity, and responsibility to operate a sports pool. In developing rules and regulations applicable to sports wagering, the division shall examine the regulations implemented in other states where sports wagering is conducted and shall, as far as practicable, adopt a similar regulatory framework. The division, in consultation with the commission, shall promulgate regulations necessary to carry out the provisions of this act, including, but not limited to, regulations governing the:

a. amount of cash reserves to be maintained by operators to cover winning wagers;

b. acceptance of wagers on a series of sports events;

c. maximum wagers which may be accepted by an operator from any one patron on any one sports event;

d. type of wagering tickets which may be used;

e. method of issuing tickets;

f. method of accounting to be used by operators;

g. types of records which shall be kept;

h. use of credit and checks by patrons;

i. type of system for wagering;

j. protections for a person placing a wager; and

k. display of the words, "If you or someone you know has a gambling problem and wants help, call 1-800 GAMBLER," or some comparable language approved by the division, which language shall include the words "gambling problem" and "call 1-800 GAMBLER," on all print, billboard, sign, online, or broadcast advertisements of a sports pool and in every sports wagering lounge.

N.J. Stat. § 5:12A-4.1 provides:

§ 5:12A-4.1. Use of mobile gaming devices permitted under certain circumstances

a. Notwithstanding the provisions of any other law to the contrary, the Division of Gaming Enforcement may authorize the use of mobile gaming devices approved by the division within an approved hotel facility that operates a sports pool pursuant to the provisions of P.L.2011, c.231 (C.5:12A-1 et seq.), to enable a player to place wagers on sports or athletic events, provided the player has established an account with the casino licensee, the wager is placed by and the

winnings are paid to the patron in person within the approved hotel facility, the mobile gaming device is inoperable outside the approved hotel facility, and provided that the division may establish any additional or more stringent licensing or other regulatory requirements necessary for the proper implementation and conduct of mobile gaming as authorized by this section.

For the purposes of this subsection, the approved hotel facility shall include any area located within the property boundaries of the casino hotel facility, including any outdoor recreation area or swimming pool, where mobile gaming devices may be used by patrons in accordance with this section, but excluding parking garages or parking areas, provided that mobile gaming shall not extend outside of the property boundaries of the casino hotel facility.

b. Notwithstanding the provisions of any other law to the contrary, the Division of Gaming Enforcement and the New Jersey Racing Commission may authorize the use of mobile gaming devices approved by the division and the commission within a racetrack that operates a sports pool pursuant to the provisions of P.L.2011, c.231 (C.5:12A-1 et seq.), to enable a player to place wagers on sports or athletic events, provided the player has established an account with the permitholder, the wager is placed by and the winnings are paid to the patron in person within the racetrack, the mobile gaming device is inoperable outside the racetrack, and provided that the division and the commission may establish any additional or more stringent licensing or other regulatory requirements necessary for the proper implementation and conduct of mobile gaming as authorized by this section.

For the purposes of this subsection, a racetrack shall include any area located within the property boundaries of the racetrack facility where mobile gaming devices may be used by patrons in accordance with this subsection, but excluding parking garages or parking areas, provided that mobile gaming shall not extend outside of the property boundaries of the racetrack.

N.J. Stat. § 5:12A-5 provides:

§ 5:12A-5. Adoption of comprehensive house rules

Each operator shall adopt comprehensive house rules governing sports wagering transactions with its patrons. The rules shall specify the amounts to be paid on winning wagers and the effect of schedule changes. The house rules, together with any other information the division deems appropriate, shall be conspicuously displayed in the sports wagering lounge and included in the terms and conditions of the account wagering system, and copies shall be made readily available to patrons.

N.J. Stat. § 5:12A-6 provides:

§ 5:12A-6. Agreements to jointly establish sports wagering lounge; taxes; license fee for compulsive gambling programs

Whenever a casino licensee and a racetrack permit holder enter into an agreement to jointly establish a sports wagering lounge, and to operate and conduct sports wagering under this act, the agreement shall specify the distribution of revenues from the joint

sports wagering operation among the parties to the agreement. The sums received by the casino from the joint sports wagering operation shall be considered gross revenue as specified under section 24 of P.L.1977, c.110 (C.5:12-24). The sums actually received by the horse racing permit holder from any sports wagering operation, either jointly established with a casino or established independently or with non-casino partners, less only the total of all sums actually paid out as winnings to patrons, shall be subject to an 8% tax to be collected by the division and paid to the Casino Revenue Fund created under section 145 of P.L.1977, c.110 (C.5:12-145) to be used for the funding of programs for senior citizens and disabled residents and to an investment alternative tax in the same amount and for the same purposes as provided in section 3 of P.L.1984, c.218 (C.5:12-144.1).

A percentage of the fee paid for a license to operate a sports pool shall be deposited into the State General Fund for appropriation by the Legislature to the Department of Health and Senior Services to provide funds for prevention, education, and treatment programs for compulsive gambling programs that meet the criteria developed pursuant to section 2 of P.L.1993, c.229 (C.26:2-169), such as those provided by the Council on Compulsive Gambling of New Jersey, and including the development and implementation of programs that identify and assist problem gamblers. The percentage shall be determined by the division.

SENATE, No. 2460

STATE OF NEW JERSEY

216th LEGISLATURE

INTRODUCED OCTOBER 9, 2014

Sponsored by:

Senator RAYMOND J. LESNIAK

District 20 (Union)

Senator JIM WHELAN

District 2 (Atlantic)

Senator JOSEPH M. KYRILLOS, JR.

District 13 (Monmouth)

Co-Sponsored by:

Senators Beck and Scutari

SYNOPSIS

Partially repeals prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events.

CURRENT VERSION OF TEXT

As introduced.

(Sponsorship Updated As Of: 10/15/2014)

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined <u>thus</u> is new matter.

AN ACT partially repealing the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events, deleting a portion of P.L.1977, c.110, and repealing sections 1 through 6 of P.L.2011, c.231.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. (New section) The provisions of chapter 37 of Title 2C of the New Jersey Statutes, chapter 40 of Title 2A of the New Jersey Statutes, chapter 5 of Title 5 of the Revised Statutes, and P.L.1977, c.110 (C.5:12-1 et seq.), as amended and supplemented, and any rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such location or to the operation of a wagering pool that accepts such wagers from persons 21 years of age or older situated at such location, provided that the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or operation.

As used in this act, P.L. , c. (C.) (pending before the Legislature as this bill):

"collegiate sport contest or athletic event" shall not include a collegiate sport contest or collegiate athletic event that takes place in New Jersey or a sport contest or athletic event in which any New Jersey college team participates regardless of where the event takes place; and

"running or harness horse racetrack" means the physical facility where a horse race meeting with parimutuel wagering is conducted and includes any former racetrack where such a meeting was conducted within 15 years prior to the effective date of this act, excluding premises other than those where the racecourse itself was located.

2. (New section) The provisions of this act, P.L. , c. (C.) (pending before the Legislature as this bill), are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event but, rather, are intended and shall be construed to repeal State laws and regulations prohibiting and regulating the placement and acceptance, at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such locations.

3. Section 24 of P.L.1977, c.110 (C.5:12-24) is amended to read as follows:

24. "Gross Revenue" – The total of all sums actually received by a casino licensee from gaming operations, [including operation of a sports pool,] less only the total of all sums actually paid out as winnings to patrons; provided, however, that the cash equivalent value of any merchandise or thing of value included in a jackpot or payout shall not be included in the total of all sums paid out as winnings to patrons for purposes of determining gross revenue. "Gross Revenue" shall not include any amount received by a casino from casino simulcasting pursuant to the "Casino Simulcasting Act," P.L.1992, c.19 (C.5:12-191 et al.). (cf: P.L.2011, c.231, s.7)

4. (New section) The provisions of this act, P.L. , c. (C.) (pending before the Legislature as this bill), shall be deemed to be severable, and if any phrase, clause, sentence, word or provision of this act is declared to be unconstitutional, invalid, preempted or inoperative in whole or in part, or the applicability thereof to any person is held invalid, by a court of competent jurisdiction, the remainder of this act shall not thereby be deemed to be unconstitutional, invalid, preempted or inoperative and, to the extent it is not declared unconstitutional, invalid, preempted or inoperative, shall be effectuated and enforced.

5. Sections 1 through 6 of P.L.2011, c.231 (C.5:12A-1 through C.5:12A-6) are repealed.

6. This act shall take effect immediately.

STATEMENT

This bill implements the decision of the United States Court of Appeals for the Third Circuit in *National Collegiate Athletic Association v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013), wherein the

court in interpreting the Professional and Amateur Sports Protection Act of 1992 (PASPA), 28 U.S.C. § 3701 *et seq.*, stated that it does "not read PASPA to prohibit New Jersey from repealing its ban on sports wagering." *National Collegiate Athletic Association,* 730 F.3d at 232. The court further stated that "it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or *what the exact contours of the prohibition will be.*" *Id.* at 233 (emphasis added). Moreover, the United States in its brief submitted to the Supreme Court of the United States in opposition to petitions for writs of certiorari in the above-referenced case wrote that "PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, *New Jersey is free to repeal those prohibitions in whole or in part.*" United States Brief to the Supreme Court in Opposition to Petitions for Writs of Certiorari (Nos. 13-967, 13-979, 13-980), dated May 14, 2014, at 11 (emphasis added).

APPENDIX I

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant
Attorney General *Washington, D.C. 20530*

September 24, 1991

The Honorable Joseph R. Biden, Jr. Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This presents the views of the Department of Justice on S. 474, the "Professional and Amateur Sports Protection Act."

The proposed legislation would prohibit states from operating, authorizing, advertising, or otherwise promoting a lottery or any other betting, gambling, or wagering scheme that is based, directly or indirectly, on a professional or amateur sports game or performance. The bill contains exemptions for lotteries or other betting activities in a state that were actually conducted by that state prior to August 31, 1990, or were conducted in the state between September 1, 1989, and August 31, 1990. Thus, the sports-based lotteries and betting and wagering activities that are already in operation in Oregon, Nevada, and Dela-

ware would be grandfathered. The proposed legislation also expressly exempts pari-mutuel racing from its prohibitions.

Current Federal law provides a variety of restrictions on the conduct of lotteries and other gambling and betting activities. See, e.g., 18 U.S.C. §§ 1084, 1301-1304, 1953, 1955; 15 U.S.C. §§ 1171-1178. Generally speaking, it is left to the states to decide whether to permit gambling activities based upon sporting events, although Federal law generally prohibits any use of an interstate facility in connection with such sports-based gambling activities.

Section 1307 of Title 18, United States Code, however, expressly permits states to conduct and advertise their own state-authorized "lotteries," as defined in subsection 1307(d). Although Section 1307 specifically excludes the placing or accepting of bets or wagers on sporting events or contests from the definition of permissible state-conducted lotteries, neither the statute nor its legislative history answers the question of whether a state may base its lottery on the outcome of sporting events. See 1974 U.S. Code Cong. & Adm. News 7007 (original enactment of Section 1307); 1988 U.S. Code Cong. & Adm. News 4349 (amendment to Section 1307); see also United States v. Baker, 364 F.2d 107 (3d Cir.), cert. denied, 385 U.S. 986 (1966); United States v. Forte, 83 F.2d 612 (D.C. Cir. 1936). In the absence of any statutory guidance on subsection 1307(d), the Department of Justice has not taken any action against any state operating a sports-based lottery.

Our understanding is that S. 474 is, in effect, intended to clarify the prohibition on wagering on sporting events. As drafted, however, the proposed legislation may render unlawful certain state lotteries that, although they use a sports theme, do not relate to a particular sporting event. For example, a simple scratch lottery ticket that compares the score of one imaginary football team to another would be impermissible under the language of S. 474. Moreover, the bill applies to both individual amateur sports and team amateur sports, but only to team professional sports. The reason for this distinction is unclear.

Also unclear is the purpose of the exception for parimutuel racing in S. 474. Parimutuel racing is not an amateur sport. Therefore, the bill's prohibition on sports-based lotteries would only apply to parimutuel racing absent the express exception – if parimutuel racing were a team sport. Further, the parimutuel racing exception raises questions about the application of the proposed legislation to other sports, such as jai alai.

Finally, we note that determinations of how to raise revenue have typically been left to the states. The Department is concerned that, to the extent the bill can be read as anything more than a clarification of current law, it raises federalism issues. It is particularly troubling that S. 474 would permit enforcement of its provisions by sports leagues.

For these reasons, the Department opposes enactment of S. 474 as drafted. If Congress finds clarification of the sports gambling prohibition of Section 1307 necessary, we suggest that the term "lottery" be more fully defined. The "lotteries" that have prompted the

introduction of S. 474 may not be true lotteries, in that they may involve more than mere chance in determining winners: knowledge of the sports and teams in question may enhance a player's chances of winning. By carefully defining the term "lottery," the problems of overbreadth and ambiguity discussed above may be avoided.

I hope that this response adequately addresses your concerns.

Sincerely,

s/ W. Lee Rawls
W. Lee Rawls
Assistant Attorney General

* * *

RECORD AND BRIEFS

Nos. 16-476, 16-477

In the

Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, et al.,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,
Respondents.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

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Counsel for Respondents

December 14, 2016

QUESTION PRESENTED

Congress enacted the Professional and Amateur Sports Protection Act ("PASPA") to stop the spread of state-sponsored sports gambling PASPA prohibits states from sponsoring operating, advertising, promoting licensing or authorizing sports gambling and it prohibits individual conduct pursuant to any such state law Nevertheless, in 2012, New Jersey eliminated a prohibition on sports gambling and adopted a law and regulations expressly authorizing sports gambling at casinos and racetracks The district court and Third Circuit held that PASPA preempted that law and rejected New Jersey's argument that PASPA commandeers the states by prohibiting them from authorizing or licensing sports gambling This Court denied the state's petition for certiorari

Undeterred, New Jersey passed another law that avowedly sought to "implement well regulated sports gaming" by "repealing" existing prohibitions on sports gambling but only as to sports gambling that occurs at a casino or racetrack, by individuals who are 21 or older, and on particular sporting events The district court, a Third Circuit panel, and an overwhelming majority of the en banc Third Circuit all held that PASPA could not be evaded by creative labeling, that the new law was in substance an authorization forbidden by PASPA, and that PASPA does not commandeer the states

The question presented is whether PASPA is a valid exercise of Congress' Commerce Clause power

CORPORATE DISCLOSURE STATEMENT

Respondents are the National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League, and the Office of the Commissioner of Baseball. None of the respondents has a parent company. No publicly held company owns 10% or more of any respondent's stock.

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INTRODUCTION

This case involves petitioners' second attempt to convince this Court to review a novel constitutional argument that has been rejected by every court to consider it. The principal difference is that now petitioners have added three more adverse decisions, including one by an overwhelming majority of an en banc court, to the tally of strikes against them. There is no reason for this Court to reach a different result this time around.

The Professional and Amateur Sports Protection Act ("PASPA") prohibits states from affirmatively sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling, and it prohibits individual conduct pursuant to any such state law. In PASPA's 24 years, courts of appeals have considered commandeering challenges to it only twice—in this case, and in a nearly identical case just a few years earlier involving New Jersey's first effort to authorize sports gambling in its casinos and racetracks in open and acknowledged violation of PASPA. Although petitioners lost that case every step of the way, New Jersey was undeterred in its efforts to bring legalized sports gambling to its casinos and racetracks. A mere three days after this Court denied petitioners' first round of petitions attempting to invalidate PASPA, the New Jersey legislature passed a new law purporting to "repeal" the state's sports gambling prohibitions, but *only* at casinos and racetracks—in other words, only at handpicked venues for state-authorized and state-licensed gambling.

The Governor vetoed that blatant attempt, as he put it, "to circumvent the Third Circuit's ruling" and "sidestep federal law." But just two months later, the Governor saw things differently, and signed the nearly identical law that is the subject of this lawsuit. Just like the legislation that the Governor vetoed months earlier, that law purports to "partially repeal" New Jersey's sports gambling prohibition, but only as applied to sports gambling that occurs at a casino or racetrack, by individuals who are 21 or older, and on particular sporting events.

The district court, a panel of the Third Circuit, and the overwhelming majority of the en banc Third Circuit all recognized that when New Jersey dictated who could gamble on sports, where they could do it, and on which events they could bet—all with the avowed purpose of enabling sports gambling to take place in New Jersey's casinos and racetracks—the state had "authorized" sports gambling in violation of PASPA. All three courts also recognized that nothing about that commonsense conclusion calls into question the constitutionality of PASPA. Just like the first time around, petitioners' contrary arguments are irreconcilable with this Court's commandeering cases and would distort that narrow doctrine beyond all recognition. In all events, there is no question that petitioners' constitutional challenge remains novel and splitless; indeed, no other state has ever brought such a challenge (and only five states could be mustered to support New Jersey's case as *amici*). Accordingly, in the unlikely event that another state raises this argument and then succeeds in producing a circuit split, there will

be time enough for this Court to consider it. The Court should deny the petitions.

STATEMENT OF THE CASE

A. The Professional and Amateur Sports Protection Act

Congress has long recognized a federal interest in curtailing gambling on professional and amateur sports. In the Interstate Wire Act of 1961, Congress prohibited the interstate wire transmission "of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest," exempting only states where the activity was legal. 18 U.S.C. §1084(a). In 1964, Congress made it a federal crime to fix or attempt to fix any sports contest. *See id.* §224. The House Report declared such offenses "a challenge to an important aspect of American life—honestly competitive sports." H.R. Rep. No. 88-1053, at 2 (1963). The Senate sponsor likewise emphasized the need "to keep sports clean so that the fans, and especially young people, can continue to have complete confidence in the honesty of the players and the contests." 109 Cong. Rec. 2,016 (1963) (statement of Sen. Keating).

Congress also has long recognized a federal interest in regulating gambling on a nationwide basis. *See, e.g.*, *Champion v. Ames*, 188 U.S. 321 (1903) (upholding federal law prohibiting trafficking of lottery tickets as valid exercise of Congress' commerce power). And although Congress has accommodated limited state interests in legalized gambling, it has not strayed from its view that sports gambling is particularly damaging. When Congress exempted state lotteries from federal criminal lottery

laws in 1975, for instance, it excluded state-sponsored sports gambling from that exemption, making clear that federal laws would continue to apply to "placing or accepting of bets or wagers on sporting events or contests" conducted by states. *See* 18 U.S.C. §1307(d).

In 1990, amid growing public dismay about the harms of sports gambling, Congress began considering federal legislation to stem the spread of state-sponsored gambling on professional and amateur sports. At the time, although only a handful of states had authorized any form of sports gambling, various states were considering authorizing state-sponsored sports gambling to be conducted on river boats or in off-track betting parlors and casinos; others were debating introducing sports themes to their lotteries.

After a robust debate and extensive hearings, Congress concluded that although "sports gambling offers a potential source of revenue," "the risk to the reputation of one of our Nation's most popular pastimes, professional and amateur sporting events, is not worth it." S. Rep. No. 102-248, at 7 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3558; *see also id.* at 5 ("Sports gambling threatens to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling," "undermines public confidence in the character of professional and amateur sports," and "will promote gambling among our Nation's young people."). "Without Federal legislation," Congress concluded, "sports gambling is likely to ... develop an irreversible momentum." As an example, the report

singled out the "pressures in such places as New Jersey ... to institute casino-style sports gambling." *Id.*

On October 28, 1992, the President signed into law PASPA, which was approved by a vote of 88-5 in the Senate and by voice vote in the House. *See* 28 U.S.C. §3701 *et seq.* PASPA makes it "unlawful for" any "governmental entity" to "sponsor, operate, advertise, promote, license, or authorize by law or compact":

> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based ... on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

Id. §3702. PASPA also makes it unlawful for "a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a government entity," any such sports gambling. *Id.* §3702(2). In addition to granting the attorney general authority to enforce these prohibitions, PASPA gives professional and amateur sports organizations a cause of action to seek to enjoin a PASPA violation when the organization's own "competitive game is alleged to be the basis of such violation." *Id.* §3703.

To accommodate the reliance interests of the handful of states that already had authorized some form of sports gambling, PASPA exempted from its prohibitions authorized sports gambling that was in operation before its enactment. *Id.* §3704(a)(1)-(2). PASPA also included a special exemption specifically

crafted for New Jersey, a state that flatly prohibited sports gambling at the time but did have extensive authorized and licensed gambling at casinos in Atlantic City. Under this exemption, New Jersey was given until "one year after [PASPA's] effective date" to "authorize[]" sports gambling to be "conducted exclusively in casinos located in a municipality" where "any commercial casino gaming scheme was in operation ... throughout the 10-year period [before PASPA became effective] pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality." *Id.* §3704(a)(3). In other words, PASPA gave New Jersey one year to authorize sports gambling at casinos in Atlantic City.

New Jersey chose not to avail itself of PASPA's one-year window. In fact, the New Jersey legislature declined even to vote on a joint resolution proposed during that year that would have allowed a referendum on a constitutional amendment authorizing sports gambling at casinos. *See In re Pet. of Casino Licensees for Approval of a New Game, Rulemaking & Authorization of a Test*, 633 A.2d 1050, 1051 (N.J. Super. Ct. App. Div.), *aff'd*, 647 A.2d 454 (N.J. 1993) (per curiam). Instead, New Jersey continued to flatly prohibit sports gambling for the next two decades. *See, e.g.*, N.J. Stat. Ann. §2a:40-1 ("All wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event, shall be unlawful."); N.J. Stat. Ann. §§2c:37-2, 2c:37-9 (prohibiting promotion of gambling unless authorized). The New Jersey Constitution also continued to prohibit the legislature from

authorizing wagering on the results of any professional, college, or amateur sports or athletic event, excluding horse racing. *See In re Casino Licensees*, 633 A.2d at 1054.

B. New Jersey's Relentless Efforts to Authorize Sports Gambling

In recent years, New Jersey has come to regret its decision not to avail itself of the ability to authorize sports gambling in its casinos back in 1993. Accordingly, the state has undertaken a series of efforts to get out from under PASPA's prohibitions on sponsoring, licensing, or authorizing sports gambling. The state began by amending its own constitution, effective December 8, 2011, to permit the legislature "to authorize by law wagering ... on the results of any professional, college, or amateur sport or athletic event." N.J. Const. art. IV, §VII, ¶2D. The amendment included a caveat "that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place." *Id.* New Jersey then promptly enacted the Sports Wagering Law, N.J. Stat. Ann. §5:12A-1, *et seq.* (West 2012) (the "2012 Law"), which, in open and acknowledged violation of PASPA, authorized Atlantic City casinos and horse racetracks throughout the state to engage in "the business of accepting wagers on any sports event by any system or method of wagering." *Id.* §§5:12A-1, 5:12A-2.

The National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the

Commissioner of Baseball (collectively, "respondents") brought suit to enjoin this blatant violation of PASPA. The state petitioners (joined by the same parties that join them as petitioners here) responded by conceding that the law violated PASPA but arguing that PASPA is unconstitutional because it, *inter alia*, commandeers the states. After carefully considering that argument, both the district court and the Third Circuit thoroughly rejected it and enjoined New Jersey from enforcing the 2012 Law and the regulations promulgated pursuant to it. *See Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551 (D.N.J.), *aff'd*, *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) ("*Christie I*").

After the Third Circuit denied their petitions for rehearing en banc, petitioners sought this Court's review. Even before the Court could act on those petitions, however, the sponsors of the 2012 Law announced that they had no intention of letting the courts stand in the way of their plans to sanction sports gambling at New Jersey's casinos and racetracks. As Senator Raymond Lesniak put it, no matter what the outcome before this Court, "we will push the envelope on sports betting. And we are not going to be deterred." JA101. To that end, the senator vowed that if this Court left undisturbed the lower court decisions invalidating the 2012 Law, he would introduce new legislation that, once again, would "allow casinos and racetracks to have sports betting." *Id.*

This Court denied the petitions on June 23, 2014. *See Christie v. Nat'l Collegiate Athletic Ass'n*, 134

S. Ct. 2866 (2014). Three days later, the New Jersey legislature made good on Senator Lesniak's promise and passed Senate Bill 2250, 216th Leg., 1st Sess. (N.J. 2014) ("S2250"). S2250 purported to "repeal" the state's existing prohibitions on sports gambling, but *only* "to the extent they would apply to such wagering at casinos or gambling houses in Atlantic City or at current running and harness racetracks in this State." S2250. In other words, it purported to "repeal" the prohibitions only at state-licensed and heavily regulated commercial gambling venues. As Senator Lesniak, who sponsored the legislation, explained, like the invalidated 2012 Law before it, S2250 would "put [sports gambling] in the regulated hands of existing casino and racetrack operators" in New Jersey and "provide a safe and legal avenue for [people] to bet on their favorite teams." JA108.

On August 8, 2014, Governor Christie vetoed this unabashed effort to undo the outcome of *Christie I*. In a letter accompanying his veto, the Governor described the legislation as a "novel attempt to circumvent the Third Circuit's ruling" by, "[i]n essence, partially deregulat[ing] betting at casinos and racetracks in an attempt to sidestep federal law." JA65. Reiterating that "the rule of law is sacrosanct," and "binding on all Americans," the Governor refused to sign on to the legislature's transparent effort to "[i]gnor[e] federal law." *Id.* Instead, he admonished that the state must respect the rule of law and the decisions of the courts. *Id.*

One month later, the Governor saw things differently. On September 8, 2014, with the Governor's support, New Jersey's acting attorney

general issued a directive taking the remarkable position that, notwithstanding the affirmed injunction prohibiting the state defendants from enforcing the 2012 Law in its entirety, the provisions of that law stating that casinos and racetracks "may operate a sports pool" continued to remain "in force and effect." JA118-21. This was so, according to the state, because, notwithstanding their plain language, these provisions did not "authorize" sports gambling, but rather merely "repealed" existing prohibitions on sports gambling at casinos and racetracks. JA120-21. The directive thus instructed the state's law enforcement agencies that they should neither object to nor seek to enjoin a sports pool operated by a casino or racetrack, so long as that sports pool did not permit wagering on college sporting events that take place in New Jersey or in which a New Jersey college team participates. JA121.

Although the state declared this directive effective immediately, the state petitioners simultaneously filed a motion asking the district court to "clarify" or "modify" its injunction to conform to their dubious new theory. Respondents opposed the motion, arguing that the directive violated both the injunction and PASPA. Before the court could act on that motion, however, New Jersey changed course once again. On October 17, 2014, Governor Christie signed into law Senate Bill 2460, 216th Leg., 1st Sess. (N.J. 2014) (the "2014 Law"), another Senator Lesniak-sponsored piece of legislation, which repealed the 2012 Law in its entirety, *see* N.J. Stat. Ann. §5:12A-7, and the state petitioners then withdrew their pending motion.

As one of its sponsors candidly acknowledged, the 2014 Law is yet another attempt to achieve the same thing as the invalidated 2012 Law—namely, to "implement well regulated sports gaming" in New Jersey's casinos and racetracks. JA434. The law does so in the same manner as the vetoed S2250 would have done, *i.e.*, by purporting to "repeal" existing prohibitions on sports gambling, but *only* "to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State." N.J. Stat. Ann. §5:12A-7. This "partial repeal" applies, moreover, *only* to sports gambling "by persons 21 years of age or older situated at such location," and *only* to gambling that is not on "a collegiate sport contest or collegiate athletic event that takes place in New Jersey or ... in which any New Jersey college team participates regardless of where the event takes place." *Id.* In short, the 2014 Law, like the 2012 Law before it, ensured that sports gambling would be permitted only at certain locations, by certain persons, and on some, but not all, sporting events.

C. Proceedings Below

1. Respondents promptly responded by filing this new lawsuit asking the district court to enjoin the state petitioners from giving effect to New Jersey's latest effort to authorize licensed sports gambling at its casinos and racetracks in violation of PASPA. In addition to naming the same state petitioners named in *Christie I*, respondents named as defendants the New Jersey Thoroughbred Horsemen's Association ("NJTHA"), which operates Monmouth Park

Racetrack and announced within mere hours of the 2014 Law's signing its intent to "begin offering and accepting wagers on sporting contests and athletic events" at the racetrack within the week, JA97, as well as the New Jersey Sports and Exposition Authority ("NJSEA"), the state instrumentality that owns Monmouth Park (and other state-sponsored gambling venues). The complaint sought to enjoin the state petitioners and NJSEA from violating section 3702(1) of PASPA pursuant to the 2014 Law and to enjoin NJTHA from violating section 3702(2).

Petitioners refused to agree to hold off initiating sports gambling, even for a few weeks, to give the district court time to consider the legality of New Jersey's latest actions, leaving respondents no choice but to seek a temporary restraining order. The district court granted that order after concluding that respondents had established a reasonable likelihood of success on the merits and irreparable harm. JA303-09. After additional briefing, the court noticed its intent to "consolidate Plaintiffs' application for a preliminary injunction with a decision on the merits through summary judgment." Pet.App.88a. The United States, which supported respondents in the first round of *Christie* litigation, then filed a statement of interest agreeing with respondents that the 2014 Law authorizes and licenses sports gambling in violation of PASPA. JA541-61.

After holding a hearing, the district court permanently enjoined the state petitioners from "giving operation or effect" to the 2014 Law. Pet.App.113a. The court concluded that "PASPA preempts the type of *partial repeal* New Jersey is

attempting to accomplish in the 2014 Law." Pet.App.105a. Not only would "the 2014 Law ... have the same primary effect of the 2012 Law," but "by allowing some, but not all, types of sports wagering in New Jersey," the court explained, the law "necessarily results in sports wagering with the State's imprimatur, which goes against the very goal of PASPA." Pet.App.105a-07a. Although the court acknowledged that New Jersey "carefully styled the 2014 Law as a repeal," Pet.App.107a, the court recognized that "'the Supremacy Clause is not so weak that it can be evaded by mere mention of [a] word,' nor can it 'be evaded by formalism,' which would only 'provide a roadmap for States wishing to circumvent' federal law." Pet.App.106a (citation omitted) (quoting *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 382-83 (1990) & *Haywood v. Drown*, 556 U.S. 729, 742 & n.9 (2009)).[1]

2. Petitioners again appealed to the Third Circuit, which held that the 2014 Law, like the 2012 Law before it, violated PASPA. Pet.App.60a. As the court explained, "the 2014 Law authorizes sports gambling by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling." Pet.App.60a-61a. Allowing sports gambling in only those limited circumstances "constitutes specific

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[1] Having enjoined the state petitioners from giving any operation or effect to the 2014 Law, the court found no need to resolve respondents' claims against NJSEA and NJTHA. Pet.App.110a.

permission and empowerment," as "the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited." Pet.App.60a-61a. The court also noted that the 2014 Law was at particular odds with PASPA's exception allowing New Jersey to authorize sports gambling at its casinos within one year of PASPA's enactment. Pet.App.62a. As the court noted, Congress could not plausibly have intended to allow New Jersey to accomplish through a dubiously labeled "partial repeal" the exact same result that PASPA gave New Jersey only one year to achieve. Pet.App.62a-63a.

Judge Fuentes, the author of *Christie I*, issued a dissent in which he maintained that the 2014 Law did not violate PASPA because a law styled as a repeal—whether "partial" or otherwise—can never be an "authorization." Pet.App.67a.

3. The Third Circuit agreed to hear petitioners' case en banc. In a 9-3 decision, the court once again rejected petitioners' argument that PASPA unconstitutionally commandeers the states.

The en banc court began by agreeing with the panel majority that the 2014 Law "authorized" sports gambling in violation of PASPA. As the court explained, "this is not a situation where there are *no* laws governing sports gambling in New Jersey." Pet.App.12a. To the contrary, New Jersey flatly prohibits sports gambling. It is the 2014 Law that "provides the authorization for conduct that is otherwise clearly and completely legally prohibited." Pet.App.13a. Moreover, the law also "authorizes sports gambling by selectively dictating where sports gambling may occur, who may place bets in such

gambling, and which athletic contests are permissible subjects for such gambling." Pet.App.13a. By allowing "casinos and racetracks and their patrons to engage, under enumerated circumstances, in conduct that other businesses and their patrons cannot," the law grants "specific permission and empowerment." Pet.App.13a.

In reaching that conclusion, the court expressly rejected petitioners' argument that a repeal can never constitute an authorization. Pet.App.13a. At the same time, however, the court also declined to interpret PASPA as limiting a state's options to either complete prohibition or complete repeal. Pet.App.13a. Instead, the court simply concluded that "the presence of the word 'repeal' does not prevent us from examining what the provision actually does." Pet.App.14a. And "[w]hile artfully couched in terms of a repealer, the 2014 Law essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling. This is an authorization." Pet.App.14a.[2]

The court then rejected petitioners' reprise of their argument that PASPA unconstitutionally commandeers the states. The court first reiterated, as the panel held in *Christie I*, that the

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[2] Having concluded that the 2014 Law authorizes sports gambling in violation of PASPA, the court declined to address respondents' (and the United States') additional argument that, by confining sports gambling to state-licensed gambling venues, the law also licenses sports gambling in violation of PASPA. Pet.App.16a n.7.

commandeering doctrine has never been understood to apply "where the states were not compelled to enact laws or implement federal statutes or regulatory programs." Pet.App.19a. And after examining this Court's preemption and commandeering cases in exhaustive detail, the court found PASPA "more akin to those laws upheld" by this Court than to the two unusual laws struck down in *New York* and *Printz*. Pet.App.22a.

The court then rejected petitioners' argument that "if the legislature cannot repeal New Jersey's prohibition as it attempted to do in the 2014 Law, then it is required to affirmatively keep the prohibition on the books, and PASPA unconstitutionally commandeers the states." Pet.App.22a-23a. As the court explained, not only does New Jersey still retain the option of complete repeal, but the mere fact "[t]hat a specific partial repeal which New Jersey chose to pursue in its 2014 Law is not valid under PASPA does not preclude the possibility that other options may pass muster." Pet.App.24a. And while the court declined to accept the proposition "that PASPA presents states with a strict binary choice between total repeal and keeping a complete ban on their books," the court saw no need to "articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA" because "[i]t is sufficient" for this case "that the 2014 Law overstepped it." Pet.App.24a. The court found it enough for constitutional purposes, moreover, that PASPA "does not *require* ... the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any

way enforce federal law." Pet.App25a (quoting *Christie I*, 730 F.3d at 231). "Put simply, PASPA does not impose a coercive either-or requirement or affirmative command." *Id.*

Judge Fuentes, joined by Judge Restrepo, dissented once again, reasoning that a repeal can never be treated as an "authorization" under PASPA. Pet.App.27a-34a. Judge Vanaskie, the lone dissenter in *Christie I*, also continued to dissent, reiterating his view that PASPA effectively requires states to maintain sports gambling prohibitions in violation of the commandeering doctrine because there is no workable "distinction between repeal and authorization." Pet.App.46a.

REASONS FOR DENYING THE PETITION

Petitioners' commandeering challenge to PASPA is as novel, splitless, and meritless as it was when the Court declined to hear it just two years ago. PASPA prohibits states from sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling, and it separately prohibits individual conduct pursuant to any such state law. This belt-and-suspenders approach of preempting state laws that affirmatively authorize sports gambling and prohibiting private conduct pursuant to such laws is an unremarkable exercise of Congress' settled power to regulate commerce in sports gambling. PASPA is nothing like the only two statutes this Court has invalidated under the commandeering doctrine, both of which *compelled* states to enact or implement federal regulatory schemes. Not surprisingly, then, every court to consider New Jersey's arguments has rejected them.

Petitioners nonetheless ask this Court for yet another bite at the apple, insisting that PASPA *must* commandeer the states because it preempts New Jersey's attempt to "partially repeal" its otherwise-blanket sports gambling prohibitions—but only at less than a dozen handpicked venues licensed for state-authorized gambling. Far from evincing any constitutional problem, PASPA's preemption of that novel law follows from a straightforward operation of the principle that the substance of a state law, not its label or form, controls the preemption analysis. As the en banc court was at pains to make clear, the conclusion that PASPA preempts *this* "repeal" hardly means that PASPA necessarily preempts *all* efforts to repeal sports gambling prohibitions, or somehow compels states to maintain sports gambling prohibitions. Petitioners' commandeering challenge thus continues to rest, as it always has, on a misunderstanding of PASPA. Simply put, a federal law does not commandeer the states just because it *limits* their policy options.

In all events, in the exceedingly unlikely event that a court ever accepts the argument that PASPA impermissibly commandeers the states, there will be time enough to consider the question when the circuits are split and an act of Congress has been invalidated rather than upheld. Here, by contrast, the criteria for this Court's review are not remotely satisfied. The Court thus should once again decline to review this novel, splitless, and meritless challenge.

I. Petitioners' Repeatedly Rejected Argument That PASPA Commandeers The States Does Not Warrant This Court's Review.

Petitioners do not suggest that there is any division among the lower courts on whether PASPA violates the commandeering doctrine. Nor could they, as the novelty of their argument eliminates any such possibility. The only other case to address PASPA's constitutionality was petitioners' own unsuccessful effort to invalidate the statute just a few years ago. *See Christie I*, 730 F.3d at 216 ("This is the first case addressing PASPA's constitutionality."). Indeed, in its nearly 25-year existence, PASPA has generated a grand total of four court of appeals opinions—all four from the Third Circuit, all four resolved against a state resisting the statute's application.

Three of those opinions (*Christie I*, the *Christie II* panel opinion, and the *Christie II* en banc opinion) were generated by the same petitioners pressing the same arguments as they press here. *See id.* ("Only one Court of Appeals has decided a case under PASPA—ours.").[3] The fourth opinion—and the only PASPA case that did not involve New Jersey's efforts

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[3] That is not to suggest that there is a plethora of district court PASPA litigation. To respondents' knowledge, the district courts have produced only two PASPA decisions other than those that led to the four Third Circuit opinions addressing the statute. *See Interactive Media Entm't & Gaming Ass'n v. Holder*, No. 09-1301 (GEB), 2011 WL 802106 (D.N.J. Mar. 7, 2011) (dismissing constitutional challenge to PASPA for lack of standing); *Flagler v. U.S. Att'y for Dist. of N.J.*, No. 06-3699 (JAG), 2007 WL 2814657 (D.N.J. Sept. 25, 2007) (same).

to legalize sports gambling at its casinos and racetracks—did not involve a commandeering challenge, but rather involved Delaware's effort to shoehorn a new initiative into PASPA's grandfathering provision, which fared no better than New Jersey's repeated efforts to invalidate the statute. *See Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009) (rejecting Delaware's arguments), *cert. denied*, 559 U.S. 1106 (2010). Accordingly, petitioners' contention that PASPA commandeers the states is a novel argument about a rarely invoked statute that has been rejected by every court to consider it.

Even widening the lens to commandeering cases more generally, petitioners identify no conflict in need of this Court's resolution. That is because their exceedingly expansive view of the commandeering doctrine—namely, that the doctrine applies not just when Congress forces states to act, but also when Congress prohibits states from acting, or even constrains their policymaking authority—has been rejected by every court to consider it. *See, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 397 (2d Cir. 2008) (rejecting commandeering claim where statute "impose[d] no affirmative duty of any kind"); *Fraternal Order of Police v. United States*, 173 F.3d 898, 906-07 (D.C. Cir. 1999) (rejecting commandeering claim where statute did "not force state officials to do anything affirmative"); *United States v. Bostic*, 168 F.3d 718, 724 (4th Cir. 1999) (rejecting Tenth Amendment claim where statute imposed no "affirmative obligation"). As this unanimous body of case law reflects, petitioners' revolutionary view of the commandeering doctrine is

utterly inconsistent with this Court's cases and well-settled preemption doctrines. *See infra* Part II. In short, there is simply nothing about PASPA that renders it comparable to the two unusual statutes this Court held unconstitutional in its commandeering cases.

Nor is petitioners' commandeering challenge to PASPA exceptionally important or likely to recur. As noted, PASPA has spawned just five cases and four appellate opinions in its more than two decades on the books—all within the Third Circuit. And in the 24 years since its enactment, states have expressed little or no concern about PASPA, let alone about its constitutionality. In the highly unlikely event that an influx of constitutional challenges to PASPA should materialize, there will be time enough for this Court to resolve any commandeering question if and when a conflict arises—and to do so with the benefit of the views of more than one court of appeals and perhaps in a state without New Jersey's nearly unique history concerning state-authorized gambling. Indeed, petitioners' complaint that the Third Circuit did not opine on precisely what types of state laws PASPA permits only underscores why further percolation could assist this Court in the event subsequent litigation materializes. NJ.Pet.31-34.

Finally, the mere fact that PASPA has frustrated New Jersey's desire to authorize sports gambling is not nearly enough to warrant this Court's review. Every case finding preemption involves a state law trumped by a federal statute through operation of the Supremacy Clause, yet this Court certainly does not grant certiorari every time a state complains that

federal law has interfered with its policy choices. This case thus does not come close to satisfying any of this Court's criteria for granting certiorari.

II. The Courts Below Correctly Concluded That PASPA Does Not Commandeer The States.

The Court should also deny review because petitioners' oft-rejected commandeering argument is not only splitless and novel, but meritless as well. As the district court, a Third Circuit panel, and now nine members of the 12-judge en banc court correctly concluded, PASPA lacks the irreducible minimum of any successful commandeering claim: It does not compel states (or state officials) to do anything. Instead, PASPA only *prohibits* states from licensing or authorizing sports gambling, and prohibits private parties from sponsoring, operating, advertising, or promoting sports gambling pursuant to state law. Accordingly, PASPA is a straightforward exercise of Congress' power to preempt the operation of state laws that conflict with federal policy on matters within Congress' purview.

Attempting to resist that conclusion, petitioners continue to insist (as they did in their last round of cert petitions) that PASPA prohibits New Jersey from repealing its sports gambling prohibitions, and thus effectively compels states to maintain sports gambling laws. PASPA does nothing of the sort. If New Jersey wants to repeal its long-standing sports gambling prohibitions entirely, as opposed to channeling sports gambling to its casinos and racetracks, it remains just as free to do so now as it was when it last sought this Court's review.

Moreover, the Third Circuit stressed that New Jersey may also be able to repeal or modify aspects of those prohibitions without repealing them entirely. What PASPA prohibits is New Jersey's blatant attempt to circumvent the statute's preemptive force by styling as a "partial repeal" something that plainly constitutes an authorization. Indeed, there is no other way to understand a law that does not remove a single piece of statutory text from the books, but rather just purports to "partially repeal" otherwise-operational sports gambling prohibitions by simply declaring them inapplicable to certain people (those 21 or older), certain games (those that do not involve a New Jersey college team or collegiate events taking place in New Jersey) and certain venues (casinos and racetracks licensed to offer state-authorized gambling).

As the en banc court went out of its way to make clear, that commonsense conclusion does not mean that PASPA prohibits any and all state efforts to repeal or alter existing sports gambling prohibitions. It just means that PASPA, like every other federal statute, looks to the substance of state laws, not just at labels. And there is nothing remarkable—let alone cert-worthy or constitutionally suspect—about the Third Circuit's conclusion that whatever else PASPA may prohibit or permit, it does not allow a state to use wordplay to channel sports gambling to its favored venues for state-authorized gambling while prohibiting it everywhere else.

1. Wrenching out of context a single line of dictum from *New York v. United States*, 505 U.S. 144 (1992), petitioners insist that PASPA is

constitutionally infirm because it "regulate[s] state governments' regulation of interstate commerce," NJ.Pet.19 (quoting *New York*, 505 U.S. at 166), and leaves insufficient "room" for states to "relax[] state-law prohibitions on sports wagering as to particular persons or places," *id.* at 18. That novel theory of the commandeering doctrine is wholly divorced from this Court's cases and would have extraordinary consequences for the federal-state balance. Scores of federal statutes regulate states' ability to regulate commerce by explicitly precluding states from enacting laws that conflict with federal policy.[4]

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[4] *See, e.g.*, *Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096 (2013) (considering 49 U.S.C. §14501(c)(1), which provides that a state "may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property"); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008) (same); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992) (considering 49 U.S.C. App. §1305(a)(1), which precluded "States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes"); 7 U.S.C. §136v(b) (a "State shall not impose or continue in effect any requirements for labeling or packaging [pesticides] in addition to or different from those required under this subchapter"); 15 U.S.C. §1121(b) ("[n]o State or other jurisdiction of the United States or any political subdivision or any agency thereof may" impose certain requirements relating to trademarks); 21 U.S.C. §360k(a) ("no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement" that conflicts with federal requirements); 21 U.S.C. §678 (identifying requirements relating to food or drug inspection that "may not be imposed by any State"); 46 U.S.C. §4306 ("a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a

Neither this Court nor any other has suggested that such laws raise commandeering concerns simply because they remove some of the tools states could otherwise use to "regulat[e] private conduct within their borders." NJ.Pet.19. And certainly the fact that Congress is explicit, rather than implicit, about its intent to displace state law pursuant to the Supremacy Clause is no strike against it. To the contrary, this Court has confirmed that "[t]here is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Arizona v. United States*, 132 S. Ct. 2492, 2500-01 (2012); *cf. Wyeth v. Levine*, 555 U.S. 555, 587 (2009) (Thomas, J., concurring) (questioning implied preemption doctrine while reaffirming Congress' ability to expressly preempt state law).

Commandeering concerns arise only when, rather than *withdraw* powers from states (whether explicitly or implicitly), Congress commandeers states by imposing affirmative duties on them that

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recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment"); 49 U.S.C. §11501(b) ("a State, subdivision of a State, or authority acting for a State or subdivision of a State may not" impose certain taxes on rail transportation property); 49 U.S.C. §31111(b) ("a State may not prescribe or enforce a regulation of commerce" that imposes length requirements on certain vehicles); 49 U.S.C. §40116(b) ("a State, a political subdivision of a State, and any person that has purchased or leased an airport under ... this title may not levy or collect a tax, fee, head charge, or other charge on" air commerce or transportation).

force states to do Congress' bidding. This Court's commandeering cases (not to mention the very name of the doctrine) make that crystal clear. The fatal flaw in the provision of the Radioactive Waste Policy Amendments Act at issue in *New York* was that it *required* states either to enact particular legislation or take title to radioactive waste. *See New York*, 505 U.S. at 175. Either option required affirmative action by the state, and, thus, neither option was constitutionally permissible. *Id.* at 177. The provision of the Brady Handgun Violence Protection Act at issue in *Printz v. United States*, 521 U.S. 898 (1997), suffered from a variant of the same basic defect: By *requiring* state and local law enforcement officers to conduct federally mandated background checks for handgun sales, it unconstitutionally conscripted state law enforcement officers into federal service. *See id.* at 902-05.

As these cases reflect, the commandeering doctrine embodies two related—and limited—principles: "The Federal Government may neither issue directives requiring the States to address particular problems," as in *New York*, "nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program," as in *Printz*. *Id.* at 935. Nothing about those two principles imperils the ordinary operation of the Supremacy Clause. To the contrary, *Printz* went out of its way to distinguish the rare statute that poses a commandeering problem from the multitude of federal statutes that simply preempt state laws that conflict with federal policy. *See Printz*, 521 U.S. at 913 (noting the "duty owed to the National Government, on the part of *all* state

officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid").

Thus, while it is easy and tempting to take a few sentences from *New York* and *Printz* out of context, both this Court and the courts of appeals consistently have rejected "commandeering" challenges and reaffirmed that *New York* and *Printz* do not call into question large swaths of the federal code. *See, e.g.*, *Reno v. Condon*, 528 U.S. 141 (2000).[5] Unless it is to swallow preemption whole, the commandeering doctrine simply cannot be understood to invalidate laws that neither "require [a state] to enact any laws or regulations" nor "require state officials to assist in the enforcement of federal statutes." *Id.* at 150-51.

2. As the Third Circuit has now correctly recognized on three separate occasions, PASPA runs

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[5] *See also, e.g.*, *Strahan v. Coxe*, 127 F.3d 155, 167-70 (1st Cir. 1997); *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 122 (2d Cir. 2002); *Kennedy v. Allera*, 612 F.3d 261, 268-70 (4th Cir. 2010); *Texas v. United States*, 106 F.3d 661, 665-66 (5th Cir. 1997); *Cutter v. Wilkinson*, 423 F.3d 579, 588-90 (6th Cir. 2005); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 367 F.3d 650, 662-65 (7th Cir. 2004); *Dakota, Minn. & E. R.R. v. South Dakota*, 362 F.3d 512, 517-18 (8th Cir. 2004); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 844-48 (9th Cir. 2003); *Okla. ex rel. Okla. Dep't of Public Safety v. United States*, 161 F.3d 1266, 1271-73 (10th Cir. 1998); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1242-43 (11th Cir. 2004); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1305-07 (D.C. Cir. 2004).

afoul of neither of the principles the commandeering doctrine embodies. PASPA "does not *require* or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law." Pet.App.25a (quoting *Christie I*, 730 F.3d at 231). Indeed, New Jersey complied with PASPA for two decades without enacting or implementing anything. Instead, PASPA only *prohibits* states from enacting laws that interfere with federal objectives by, *inter alia*, licensing or authorizing sports gambling. PASPA's effect on state law is thus nothing like the effect of the statutes in *New York* and *Printz*; instead, it has the same effect as the countless federal statutes that displace state law through the ordinary operation of the Supremacy Clause.

According to petitioners, PASPA does not confine itself to prohibiting states from authorizing sports gambling, but rather reaches more broadly to prohibit states from repealing sports gambling prohibitions, thereby effectively compelling states to maintain and enforce laws prohibiting sports gambling. Even setting aside the bedrock rule that statutes should be read to avoid constitutional questions, not to create them, *see, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), PASPA plainly does no such thing. PASPA preempts only those state laws that "sponsor, operate, advertise, promote, license, or authorize" sports gambling. 28 U.S.C. §3702(1). And PASPA preempts the two sports wagering laws that New Jersey has enacted

because both authorized and licensed sports gambling.

Petitioners resist that conclusion, insisting that the 2014 Law sought only to "repeal" existing prohibitions, not to "authorize" sports gambling. As the courts below correctly recognized, that argument is mere semantics. To be sure, New Jersey styled the 2014 Law as a "partial repeal"—in an acknowledged effort to try to get around PASPA and the Third Circuit's decision affirming its constitutionality. But in this context as in all others, states may not "elevate form over substance ... to evade" federal preemption. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214-15 (2004). And simply labeling a law a "repeal" does not end the analysis. Indeed, Governor Christie himself recognized as much when he vetoed S2250, acknowledging that using a purported "repeal" to "partially deregulat[e] betting" only at certain locations by certain people on certain events is an impermissible "attempt to sidestep federal law." JA65.

Yet that is precisely what the 2014 Law did. The law did not actually "repeal" a single one of New Jersey's comprehensive prohibitions on sports wagering; indeed, it did not even eliminate a single word from those laws. It just declared those prohibitions inapplicable to the places, persons, and sporting events of the state's choosing. The courts below correctly found that "partial repeal" law preempted precisely because there *is* a meaningful and principled difference between a true repeal and an authorization. And labels notwithstanding, the 2014 Law cannot be understood as anything other

than an authorization for sports gambling to occur at the state's favored venues for state-authorized gambling. Indeed, by affirmatively channeling sports gambling exclusively to *state-licensed gambling venues*, the law not only authorized sports gambling, but effectively licensed it as well.

That does not mean, as petitioners would have it, that New Jersey is now compelled to "maintain state-law prohibitions" on sports gambling. NJ.Pet.3. It just means that the particular law through which New Jersey attempted to alter the scope of those prohibitions (without actually repealing them in any true sense) does not comport with PASPA. As the en banc court was at pains to make clear, New Jersey is still free to pass a true repeal that actually eliminates its sports gambling prohibitions entirely, or alters them in other respects that do not run afoul of PASPA. Pet.App.24a. Moreover, whether and to what degree to enforce its sports gambling prohibitions, and what penalties to attach to them, remain questions for New Jersey.[6] Petitioners are therefore simply wrong to contend that PASPA forces New Jersey to do anything.

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[6] To the extent petitioners suggest that the district court's injunction somehow compels New Jersey to maintain or enforce its existing sports gambling prohibitions, that is incorrect. The injunction simply enjoins the state petitioners from implementing the 2014 Law. Pet.App.114a-16a. If that means the state petitioners are now obligated to enforce the state's still-extant sports gambling prohibitions, that is a consequence of state law, and the legislature's decision to keep those prohibitions on the books, not of anything in the district court's order.

Petitioners are thus reduced to arguing that PASPA runs afoul of the commandeering doctrine not because it compels states to enact or enforce federal policies, but because it fails to "'afford[] sufficient room' for States to determine how they will regulate sports wagering." NJ.Pet.22-23. As they put it, if New Jersey cannot "selectively grant[] permission to certain entities to engage in sports wagering," then "[w]hat options does this leave for New Jersey to stanch black market wagering throughout the State?" NJ.Pet.23. That reveals the fundamental problem with their argument, as their real issue with PASPA is not that it forces the state to prohibit sports gambling. Indeed, if all New Jersey wanted were to "stanch black market wagering," then it is hard to see why it would have any problem with a law that plainly leaves the state free to actually *enforce* or strengthen the blanket prohibitions that it already has in place. The problem is, New Jersey's preferred solution to its "black market" sports gambling problem is not to *eliminate* that market, but rather to affirmatively embrace sports gambling, and channel it to its casinos and racetracks. And that is precisely what Congress plainly sought to prohibit in PASPA. Indeed, Congress could not have been clearer that a law opening up Atlantic City casinos to sports gambling violated PASPA, which is why New Jersey was given an exemption for a one-year window, and only a one-year window, to adopt such a law.

Tellingly, petitioners cite no authority for the novel proposition that Congress runs afoul of the commandeering doctrine any time it takes a state's *preferred* policy option off the table. That is because

the Constitution has never been understood to require the federal government to leave states with "sufficient room" to override Congress' policy preferences in areas that concededly fall within Congress' enumerated powers. To the contrary, constraining the scope of states' policymaking authority is a natural consequence of countless preemption schemes.

For instance, a state does not have the option of "partially repealing" or "otherwise modulat[ing]," NJ.Pet.3, federal standards that it has agreed to adopt and enforce on the federal government's behalf. *See, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). But that narrowing of options hardly invalidates putting a state to the choice of enforcing the federal standard or going it alone. Rather, Congress' ability to constrain a state's regulatory options is inherent in the Supremacy Clause, which creates a "duty owed to the National Government, on the part of all state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative Acts, are ipso facto invalid." *Printz*, 521 U.S. at 913; *see also New York*, 505 U.S. at 167-68. PASPA is no different from the scores of federal statutes, explicitly distinguished by *Printz*, that prevent states from enacting or enforcing laws that conflict with federal policy. Petitioners' novel contention that New Jersey is constitutionally entitled to "room to make [its] own policy," NJ.Pet.18, would put the commandeering doctrine on a collision course with Article I, Section 8 of the Constitution.

3. Petitioners fare no better in arguing that PASPA diminishes the accountability of state or federal elected officials. NJ.Pet.29-31. In fact, federal responsibility for PASPA is clear. Not only does the statute operate on states; it also regulates private conduct directly by "prohibit[ing] individuals from engaging in a sports gambling scheme 'pursuant to' state law." Pet.App.166a (quoting 28 U.S.C. §3702(2)). And PASPA is just one small piece of Congress' broader regulation of gambling, which includes numerous prohibitions on private conduct. *See, e.g.*, 18 U.S.C. §§224, 1084, 1301, 1307(d); NJ.App.167a. As those provisions reflect, PASPA does not even force states to shoulder the costs of policing illegal sports gambling. Instead, federal law independently prohibits sports gambling that is not authorized by state law, meaning the federal government has already taken on the obligation of expending its own resources to prevent sports gambling.

Petitioners' attempt to portray PASPA as some sort of stand-alone provision that is the beginning and end of Congress' concern with sports gambling therefore distorts and ignores reality. In fact, PASPA is part and parcel of Congress' efforts to regulate private conduct *directly*, which includes expending *federal* resources to enforce *federal* prohibitions on gambling activities (including sports gambling activities) that are not authorized by state law. To be sure, those laws reflect Congress' choice to assist states in their efforts to prevent sports and other gambling, rather than to preempt the field

entirely. But that only underscores Congress' desire to respect, not override, federalism concerns.[7]

Moreover, as noted, precisely because PASPA does *not* operate solely on states, it would prohibit operation of New Jersey's sports gambling scheme even without its preemption provision, as a casino or racetrack that attempted to operate sports gambling pursuant to the 2014 Law would violate section 3702(2) of PASPA wholly independent from New Jersey's violation of section 3702(1). That underscores just how radical petitioners' position really is, as they seem to suggest that the commandeering doctrine invalidates not only laws that limit how states may regulate private conduct, but also laws that regulate private conduct directly. Surely that cannot be what this Court envisioned when it concluded that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz*, 521 U.S. at 925.

Nor can *New York* and *Printz* plausibly be read to suggest that the accountability concerns they discussed give rise to a commandeering problem every time "state officials cannot regulate in

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[7] PASPA also is part and parcel of Congress' efforts to protect respondents' interstate activities. Congress viewed respondents' sporting events as important interstate activities well worth protecting and viewed the spread of state-sponsored gambling as a threat to those games. Prohibiting state laws that interfere with federal objectives is, of course, the classic justification for federal laws that unobjectionably displace state laws pursuant to the Supremacy Clause.

accordance with the views of the local electorate." NJ.Pet.30 (quoting *New York*, 505 U.S. at 169); NJTHA.Pet.8-13. That is *always* the case when Congress preempts state law, which is why the very sentence of *New York* from which New Jersey quotes concludes with the critical caveat "*in matters not pre-empted by federal regulation.*" 505 U.S. at 169 (emphasis added). As the decision goes on to explain, when, as here, Congress explicitly preempts state law, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* at 168. The only accountability problem with which the commandeering doctrine is concerned arises "where the Federal Government compels States to regulate," thereby creating the appearance that *state officials* are responsible for policies that *Congress* forced them to enact. *Id.*

Clearly, no such problem exists here. Precisely because New Jersey stood in full compliance with PASPA for two decades without enacting or implementing anything, PASPA did not put New Jersey in a situation where it was "forced to absorb the costs of implementing a federal program" or "tak[e] the blame for [a federal program's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930. And to the extent the citizens of New Jersey are frustrated by their inability to engage in state-authorized sports gambling at casinos and racetracks, there is no question that PASPA, not New Jersey, is to blame. If there were any confusion on that score, this now four-years-running litigation has surely removed it. And if New Jersey wants to

change that dynamic, then it (along with the handful of states supporting it as *amici*) remains free to pursue the ordinary course of trying to persuade Congress to alter or repeal PASPA. But this Court should reject, just as it did the last time around, New Jersey's attempt to short-circuit that political process through an ill-conceived expansion of the commandeering doctrine.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

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GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

Respondents' brief in opposition nowhere disputes that the decisions below are the first to hold that a federal law validly may prohibit a State from repealing its own state-law prohibitions. Where the power Congress claims is unprecedented, it is a "telling indication of [a] severe constitutional problem." *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 505 (2010). And so it is here. By holding that, through PASPA, Congress may indeed "directly ... compel the States to ... prohibit" certain acts, *New York* v. *United States*, 505 U.S. 144, 166 (1992), the decision of the Third Circuit cuts deeply into the core of the reserved sovereignty of the States.

The primary thrust of respondents' opposition is that these petitions present a question no different from petitioners' previous anti-commandeering challenge because the 2014 Act's repeal is substantively identical to the state licensing scheme that was at issue in that challenge. That is demonstrably wrong. The now-repealed 2012 Law did not, as respondents now suggest, merely "eliminate[] a prohibition on sports gambling." BIO i. Rather, it provided for the *licensing and extensive regulation* of certain sports wagering activities, which remained prohibited except as licensed and regulated. Under the 2014 Act, however, the state-law prohibitions were simply repealed as to those activities; there is no licensing or other state involvement in sports wagering at all, even at venues licensed to engage in other forms of gambling. That distinction is not mere "wordplay," *id.* at 23; it reflects a fundamentally different rela-

tionship between sports wagering and the State, and certainly is not the "exact same result that PASPA" affords to Nevada, and once offered to New Jersey, *id.* at 14.

Respondents themselves previously recognized that this distinction was important. When they last opposed certiorari, respondents argued that, under PASPA, "states may not license or authorize sports gambling," but "[n]othing ... compels states to prohibit or maintain any existing prohibition on sports gambling." Leagues' Br. in Opp. at 23, *Christie I*, Nos. 13-967, 13-979, and 13-980 (U.S. May 14, 2014). And the United States likewise argued that States were free to repeal their prohibitions on sports wagering "in whole or in part." U.S. Br. in Opp. at 11, *Christie I*, Nos. 13-967, 13-979, and 13-980 (U.S. May 14, 2014) (hereinafter, "U.S. Opp.").

Respondents' tune may have changed, but the critical distinction remains, and it is constitutionally significant. Congress lacks the power to compel a State to prohibit acts under its own state laws. If all a State does is narrow its own state-law prohibitions, there is nothing Congress constitutionally may preempt.

Respondents thus now mischaracterize this Court's pronouncement in *New York* that Congress may not "regulate state governments' regulation of interstate commerce," 505 U.S. at 166, as "a single line of dictum," and otherwise deride New Jersey's invocation of that principle as "splitless." BIO 2, 17, 18, 22. But the principle that Congress may not regulate States' regulation of interstate commerce hard-

ly is dictum; it is a bedrock principle of federalism on which the entire anti-commandeering doctrine is founded. And this Court need not await a division among the courts of appeals when one such court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c).

As respondents' write-off of the federalism principles of *New York* as "dictum" suggests, the decision below cannot be reconciled with this Court's decisions. And whether Congress may prohibit States from repealing their own state-law prohibitions surely qualifies as an "important federal question." This Court should grant the petitions.

I. The Third Circuit's *En Banc* Departure from Centuries of Federalism Warrants Immediate Review

The Third Circuit's decision deeply undermines the constitutional anti-commandeering principle and conflicts with decisions of this Court and the other courts of appeals. The heart of the commandeering doctrine under *New York* and *Printz* v. *United States*, 521 U.S. 898 (1997) is that Congress, within the scope of its enumerated powers, may regulate by acting "'*directly upon the citizens*,'" but may not "require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162 (quoting *Lane Cty.* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868)) (emphasis in original). Yet, *Christie II* directly violates the anti-commandeering principle by authorizing a federal court injunction mandating that a State reinstate prohibitions it has chosen to repeal.

A congressional mandate that existing state-law prohibitions be maintained in spite of the wishes of the local electorate undermines our system of representative democracy by foisting the blame for an increasingly unpopular federal policy on state officials that must carry out the federally petrified state-law prohibitions. And the matter is made worse by the fact that, while the Third Circuit insists that PASPA affords the States room to respond to the demands of their citizens, the range of permissible policy options remains unknown—purposefully obscured in the decision below and by the ever-shifting positions of respondents and the United States.

A. The Injunction Against New Jersey's Repeal Goes to the Heart of the Commandeering Doctrine

1. The line between constitutional regulation and unconstitutional commandeering—bolstered and bounded by over a century of precedent—is clear. Congress may, within the scope of its enumerated powers, regulate "state activities" and "private individuals." *Reno* v. *Condon*, 528 U.S. 141, 150–51 (2000). On the other hand, Congress may not "control or influence the manner in which States regulate private parties," *South Carolina* v. *Baker*, 485 U.S. 505, 514 (1988), "require the States in their sovereign capacity to regulate their own citizens," *Reno*, 528 U.S. at 151, or "require the States to govern according to Congress' instructions," *New York*, 505 U.S. at 162.

Congress thus may prohibit sports wagering by individuals to the extent of its commerce power, and may prohibit States, no less than private individuals,

from participating in sports wagering activities. What it may *not* do is precisely what the Third Circuit approved—mandate that States themselves suppress sports wagering by prohibiting it under state law.

2. Respondents' characterization of the Third Circuit's position as an unremarkable reflection of a consensus view of the Tenth Amendment's scope misstates the law under both PASPA and the broader anti-commandeering doctrine.

With respect to PASPA, respondents contend that "every court to consider New Jersey's arguments has rejected them," BIO 17, a point that would be more persuasive if "every court" were not a single court of appeals, in a series of sharply divided decisions, and a single district court whose reasoning that PASPA leaves States only a "binary choice" between complete prohibition and complete repeal of all such prohibitions was rejected by the Third Circuit and the United States. Pet. App. 23a; Br. of U.S. as *Amicus Curiae* at 13–14, *Christie II* (Nos. 14-4546, 14-4568, and 14-4569) (hereinafter "U.S. Amicus"). Indeed, the *Christie I* panel rejected the State's constitutional challenge *only* because of the narrowing construction that panel adopted, and that the United States embraced before this Court, *see* U.S. Opp. 11, but which the *en banc* court now has "excise[d]." Pet. App. 23a.

With respect to the broader anti-commandeering doctrine, respondents are simply incorrect that the Third Circuit's decision reflects a consensus view. Contrary to respondents' description of *New York*'s

anti-commandeering language as "dictum," BIO 23–24 (citing *New York*, 505 U.S. at 166), circuit courts have consistently treated that language as a clear holding of this Court. *See, e.g.*, *ACORN* v. *Edwards*, 81 F.3d 1387, 1394 (5th Cir. 1996) (federal law requiring States to establish programs remedying lead contamination in drinking water violated Tenth Amendment because it "force[d] States to regulate according to Congressional direction"); *Koog* v. *United States*, 79 F.3d 452, 458 (5th Cir. 1996) (interim duties imposed on state officials through Brady Act violated Tenth Amendment even though Act did not order State to draft and enact legislation); *United States* v. *Wall*, 92 F.3d 1444, 1480 (6th Cir. 1996) (*New York*'s statement that Congress "cannot regulate state governments' regulation of interstate commerce" was a holding).

Thus, if the decision below incorporates respondents' view of the tenet that Congress may not regulate the States' regulation of interstate commerce as merely "dictum," this case is not "splitless" at all.

3. Respondents maintain that PASPA cannot violate the anti-commandeering doctrine because the statute does not require New Jersey to "maintain state-law prohibitions," BIO 30 (quoting N.J. Pet. 3), or even to "lift a finger," *id.* at 28 (quoting Pet. App. 25a). This is a perplexing argument given the lower court's injunction that effectively "obligate[s]" the State "to enforce ... sports gambling prohibitions" revived as a result of the injunctions. *Id.* at 30 n.6. Respondents suggest New Jersey could escape this compulsion by taking completely off "the books" the general prohibition on sports wagering that the 2014

Act merely narrowed. *Id.* But that would mean that PASPA does in fact put New Jersey to the "binary choice" that the United States rejected and the Third Circuit disclaimed, and that runs counter to this Court's decision in *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012). *See* N.J. Pet. 28 n.4.

But even if the injunction here left New Jersey some kind of a cognizable choice, it still would impermissibly commandeer by dictating the contents of New Jersey's state-law prohibitions. Congress can offer States a choice of adopting a federal scheme or ceding to federal authority, *see Hodel* v. *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), but it cannot foist upon the States one, two, or even a menu of state-law prohibitions from which the State must choose. That manifestly would "require the States to govern according to Congress' instructions," and is not permissible under our Federalism. *New York*, 505 U.S. at 162.

4. The unprecedented nature of the power the Third Circuit claims for Congress here defies respondents' characterization of PASPA as a "straightforward" example of preemption. BIO 18. This argument first runs into the reality that the 2014 Act, in sharp contrast to the 2012 Law, did no more than alter the scope of New Jersey's prohibitions on sports wagering, such that, for a category of sports-wagering activity, no state law prohibits or governs

it. Pet. App. 219a–222a.[1] Accordingly, what PASPA would have to preempt is the *absence* of state law, a nonsensical theory of preemption. And respondents tellingly cannot deliver even one other example of a federal law that prevents a State from repealing its own state-law prohibitions.

Respondents' preemption theory suffers from the further flaw that there is no *federal* regulatory or deregulatory scheme that has preemptive effect. Construing the Supremacy Clause as conferring "a license to Congress to prohibit state lawmaking whenever and however it desires," without the need to adopt federal law to warrant supremacy over state law, is commandeering, not preemption. States' Br. 11.[2]

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[1] Respondents repeatedly suggest that the 2014 Act is not a "true" repeal because it did not amend the preexisting prohibition itself. BIO 30. But they concede (also at 30) that the 2014 Act "alter[ed] the scope" of New Jersey's prohibitions on sports wagering when it "repealed" those prohibitions as to certain activities. Pet. App. 219a–222a. That the 2014 Act was enacted as a freestanding "repealer" statute rather than an amendment to an existing one has no bearing on the question presented.

[2] Contra-v to respondents' contentions, BIO 33, Congress' adoption of *other* regulations or criminal prohibitions in the gambling context merely highlights that it could have done so here, rather than commandeering the States. Its unlawful approach is not cured by PASPA's prohibition on sports wagering by individuals (28 U.S.C. § 3702(2)) because that provision, which prohibits gambling only if it occurs "pursuant to State law," Pet. App. 159a–160a, suffers from the same constitutional infirmity as section 3702(1).

B. Permitting the Federal Government To Dictate the Content of State Law Distorts Accountability

Commandeering has real-world consequences, including disrupting the lines of accountability between the state and federal governments and the people. Respondents' contention that, after four years of litigation, there is no doubt that "PASPA, not New Jersey, is to blame" for the lack of sports betting in the State, BIO 35, is unsupported as a factual matter and irrelevant in any event.

As this Court said in *New York*, when Congress "compels States to regulate," it is no longer making policy decisions "in full view of the public" and state officials, rather than federal officials, "suffer the consequences if the decision turns out to be detrimental or unpopular." 505 U.S. at 168; *see also Printz*, 521 U.S. at 930 ("[E]ven when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects."); N.J. Pet. 29–31. Nothing in *New York* or *Printz* suggested that those accountability concerns turn on the notoriety of the federal law in question (indeed, the Brady Act was far better known than PASPA), or whether citizens understood the effect of the federal mandate. What matters is whether, as a practical matter, state officials will be blamed for federal policies they are required to follow and enforce against the public. *See Printz*, 521 U.S. at 930.

The Third Circuit's decision maintains New Jersey's prohibition on sports wagering (e.g., N.J. Stat.

Ann. § 2A:40-1), and shifts the burden to the States to discover the "room" they have in which to govern—assuming such room is not, in fact, wholly illusory. Pet. App. 24a; *see also* BIO 23 ("New Jersey *may also be able* to repeal or modify aspects of [its] prohibitions without repealing them entirely.") (emphasis added). There can be no doubt that this approach "creat[es] the appearance that state officials are responsible for policies that Congress forced them to enact," BIO 35 (emphasis omitted), which is precisely the sort of accountability shifting that *New York* sought to guard against. *See* PLF Br. 11–12; States' Br. 14–15.

C. The Infringement of State Sovereignty Effected by the Third Circuit's Opinion Warrants Immediate Review

The Third Circuit's decision presents yet another problem warranting this Court's review: it generates enormous uncertainty and thereby inhibits States' ability to address the pressing problems presented by illegal sports wagering. Under *Christie II*, it is unclear how the Third Circuit would evaluate the legality of any state action other than the specific repeal that New Jersey enacted here. But as a matter of federalism, the boundaries of federal preemption must be clear. Here, they are anything but.

As New Jersey's *amici* have explained, illegal sports gambling poses a number of challenges for States, including enabling and funding other illegal activity, inhibiting state efforts to protect consumers, and depriving States of needed revenue and tourism.

AGA Br. 11, 13. Yet the Third Circuit's decision leaves States unsure of which steps will lead to productive policymaking and experimentation, and which steps will lead to years of costly and time-consuming litigation. *See* PLF Br. 7, 10–11; AGA Br. 21–22. Respondents cannot plausibly maintain that other States must engage in the fruitless effort to discern PASPA's scope before this Court's review becomes appropriate.

Nor should the States' sovereignty be constrained by the whims of self-interested private entities (such as respondents) or those of the United States. In *Christie I*, the Third Circuit carefully distinguished between merely "repealing" a prohibition and the affirmative authorization by law that violates PASPA. Pet. App. 158a. In its brief before this Court in *Christie I*, the United States explained, without qualification, that review was not warranted because New Jersey could repeal its restrictions on sports wagering "in whole or in part." U.S. Opp. 11.

New Jersey followed the directions of the Third Circuit and the United States to the letter, sacrificing the control it initially sought over sports wagering to ensure that there was no arguable "authoriz[ation] by law" under *Christie I*. Respondents then sued again and broadened PASPA's scope, arguing that, under *Christie I*, New Jersey had only a binary choice—repeal prohibitions on sports wagering entirely, or leave them all in place. The district court agreed, but the Third Circuit (and the United States) did not. Yet, the court refused to clarify what else, beyond

maintaining the status quo or enacting a complete repeal, would satisfy PASPA.

Now, respondents are careful to leave themselves room to argue that PASPA is *even broader* than the Third Circuit has held, acknowledging only that, in addition to a complete repeal, States "*may also be able*" to alter the scope of their prohibitions. BIO 23 (emphasis added). And the United States, which has been silent on the constitutionality of PASPA as now construed by the Third Circuit, has suggested a similarly broad, yet different, scope to PASPA—that *all* partial repeals may be impermissible if they are intended to benefit a State's economy (which, of course, all would be). U.S. Amicus 9.

Our Constitution's guarantee of federalism cannot rest on such indeterminate platitudes: The States—co-equal sovereigns in our system of federalism—should not be required to guess whether their efforts to liberalize restrictions on sports wagering are prohibited by federal law.

Where fundamental sovereign rights and the balance of power between the state and federal governments are at stake, this Court's review is warranted. In *New York*, for example, as here, opponents of certiorari argued there was no "conflict with the decision of any other court of appeals" (which New York did not meaningfully dispute), and maintained that review should be postponed until other courts could "provide definitive guidance" on the issues. U.S. Br. in Opp. at 14, 16, 25–26, *New York* v. *United States*, 505 U.S. 144 (1992) (No. 91-543). Yet this Court nevertheless granted

review to adopt the clear principles surrounding the commandeering doctrine that respondents now dismiss as dictum. Such guidance is equally needed here, in the face of a federal court injunction that prohibits a State from repealing its own laws and subjects its sovereign rights to respondents' selective efforts to enforce PASPA.

CONCLUSION

The Court should grant the petitions.

Respectfully submitted,

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RECORD
AND
BRIEFS

Nos. 16-476 and 16-477

In the Supreme Court of the United States

CHRISTOPHER J. CHRISTIE, GOVERNOR OF NEW JERSEY, ET AL., PETITIONERS

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC., PETITIONER

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. 3701 *et seq.*, prohibits States from "authoriz[ing] by law" sports-gambling schemes. 28 U.S.C. 3702(1). PASPA also prohibits private persons from operating sports-gambling schemes pursuant to state law. 28 U.S.C. 3702(2). The question presented is whether PASPA's prohibition on state authorization of sports-gambling schemes violates the Tenth Amendment.

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This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petitions for writs of certiorari should be denied.

STATEMENT

These cases present the question whether Congress may, consistent with the Tenth Amendment, prohibit States from authorizing sports-gambling schemes. That question arises in the context of New Jersey's

multi-year effort to authorize sports gambling at the State's casinos and racetracks.

A. The Professional And Amateur Sports Protection Act

In 1992, Congress enacted the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. 3701 *et seq.*, "to stop the spread of State-sponsored sports gambling." S. Rep. No. 248, 102d Cong., 1st Sess. 4 (1991) (Senate Report). At that time, States seeking to raise revenue were "considering a wide variety of State-sponsored gambling schemes," including state-operated sports lotteries and state-licensed or state-authorized private schemes such as "bets on sports at off-track betting parlors" and "casino-style sports books." *Id.* at 5. Congress concluded that "State-sanctioned sports gambling w[ould] promote gambling among our Nation's young people" and that the possible spread of sports gambling "sponsored or authorized by a State * * * [wa]s a problem of legitimate Federal concern for which a Federal solution [wa]s warranted." *Id.* at 4, 6-7.

PASPA's restrictions apply separately to States and to private parties. States (and other governmental entities) may not "sponsor, operate, advertise, promote, license, or authorize by law or compact," sports-gambling schemes. 28 U.S.C. 3702(1). A separate provision prohibits private parties from sponsoring, operating, advertising, or promoting such schemes "pursuant to the law or compact of a governmental entity." 28 U.S.C. 3702(2). Both restrictions apply to any "lottery, sweepstakes, or other betting, gambling, or wagering scheme" based on "competitive games in which amateur or professional athletes participate." 28 U.S.C. 3702.

The Attorney General can bring an action in federal court to enjoin violations of PASPA. 28 U.S.C. 3703. PASPA also authorizes sports leagues to seek injunctions against violations involving their games. *Ibid.*

When Congress enacted PASPA, four States (Delaware, Montana, Nevada, and Oregon) had sports-gambling schemes. Senate Report 8; 138 Cong. Rec. 12,973 (1992) (Sen. DeConcini). To protect those States' reliance interests, PASPA includes grandfathering provisions exempting their existing schemes. 28 U.S.C. 3704(a)(1)-(2); see Senate Report 8; *OFC COMM Baseball* v. *Markell*, 579 F.3d 293, 301-304 (3d Cir. 2009), cert. denied, 559 U.S. 1106 (2010). Congress also provided an exception for casino-based sports gambling authorized by New Jersey within one year of PASPA's effective date. 28 U.S.C. 3704(a)(3). New Jersey chose not to avail itself of that exception. Pet. App. 4a. As a result, PASPA's restrictions apply in New Jersey.

B. The 2012 Act And The *Christie I* Litigation

This is the second suit brought by sports leagues contending that New Jersey has contravened PASPA by enacting a statute that licenses and authorizes sports gambling. The first suit involved a 2012 statute, which the courts ultimately held invalid under PASPA.

1. New Jersey's constitution generally provides that "[n]o gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof" have been approved by the State's voters. Art. IV, § 7, Para. 2. The constitution has long provided exceptions allowing the legislature to "authorize by law" gambling at casinos in Atlantic City and betting on horse races. *Id.* Para. 2(D) and (F). Until recently, there was no comparable exemp-

tion for sports gambling, which was expressly prohibited by statute. Pet. App. 4a; see N.J. Stat. Ann. § 2A:40-1 (West 2010).[1]

In 2011, New Jersey's voters amended the state constitution's exceptions for gambling at casinos and racetracks to allow the legislature to "authorize by law" sports gambling at those locations. N.J. Const. Art. IV, § 7, Para. 2(D) and (F). The amendment does not permit the legislature to authorize gambling "on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates." *Ibid.*

After the amendment, the New Jersey Legislature enacted the 2012 Sports Wagering Act (2012 Act), 2011 N.J. Sess. Law Serv. 1723-1730 (West). The 2012 Act authorized licensed casinos and racetracks to conduct wagering on sporting events in accordance with the regulatory requirements applicable to their other gambling activities. See *NCAA* v. *Governor of N.J.*, 730 F.3d 208, 217 (3d Cir. 2013) (*Christie I*), cert. denied, 134 S. Ct. 2866 (2014).

2. The Nation's principal professional sports leagues and the NCAA, respondents here, filed a suit challenging the 2012 Act under PASPA. The defendants, petitioners here, were New Jersey officials and entities that sought to conduct sports gambling under the 2012 Act. *Christie I*, 730 F.3d at 217.[2]

Petitioners did not deny that the 2012 Act's authorization of sports gambling at licensed casinos and

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[1] References to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 16-476.

[2] Although there are some differences between the defendants in the first round of litigation and the petitioners here, see Pet. App. 6a n.2, we refer to both groups as "petitioners" for simplicity.

racetracks conflicted with the provision of PASPA barring States from "licens[ing], or authoriz[ing] by law," sports gambling. 28 U.S.C. 3702(1). Instead, they asserted that Section 3702(1) is unconstitutional, arguing among other things that it violated the Tenth Amendment's anti-commandeering principle. The United States intervened to defend Section 3702(1)'s constitutionality, and the district court rejected petitioners' arguments. *NCAA* v. *Christie*, 926 F. Supp. 2d 551, 579 (D.N.J. 2013).

3. The court of appeals affirmed. As relevant here, the court rejected petitioners' contention that Section 3702(1) violates the Tenth Amendment. *Christie I*, 730 F.3d at 226-237. Contrasting PASPA with laws that had been found to violate anti-commandeering principles, the court noted that Section 3702(1) "does not *require* or coerce the states to lift a finger—they are not required to pass laws, * * * to expend any funds, or to in any way enforce federal law." *Id.* at 231. Instead, "PASPA sets forth a prohibition" barring States from licensing or authorizing sports gambling. *Ibid.* The court emphasized that "statutes prohibiting the states from taking certain actions have never been struck down" under the anti-commandeering rule. *Ibid.*

The court of appeals rejected petitioners' contention that Section 3702(1)'s prohibition on "authoriz[ing]" sports gambling requires States to take affirmative steps to enact, maintain, or enforce prohibitions on sports gambling. *Christie I*, 730 F.3d at 232. The court reasoned that, under Section 3702(1), "a state may repeal its sports wagering ban" or "choose to keep a complete ban," while "decid[ing] how much of a law enforcement priority it wants to make of sports gam-

bling, or what the exact contours of the prohibition will be." *Id.* at 233.

Judge Vanaskie dissented in part, arguing that Section 3702(1) violates the Tenth Amendment. *Christie I*, 730 F.3d at 241-251.

4. This Court denied petitioners' petitions for writs of certiorari. *Christie* v. *NCAA*, 134 S. Ct. 2866 (2014) (No. 13-967); *New Jersey Thoroughbred Horsemen's Ass'n* v. *NCAA*, 134 S. Ct. 2866 (2014) (No. 13-979); *Sweeney* v. *NCAA*, 134 S. Ct. 2866 (2014) (No. 13-980).

C. The Present Controversy

1. In response to the Third Circuit's decision, the New Jersey Legislature passed a bill that purported to "partially repeal[]" the State's prohibitions on sports gambling, but only "at racetracks and casinos." Pet. App. 83a (brackets and citation omitted). The Governor vetoed that bill, calling it "a novel attempt to circumvent the Third Circuit's ruling." *Ibid.* (citation omitted).

Two months later, the legislature passed another bill that again purported to partially repeal the State's prohibitions on sports gambling at casinos and racetracks, S. 2640, 216th Leg. (N.J. 2014) (the 2014 Act). Pet. App. 218a-222a. This time, the Governor signed the bill into law. The 2014 Act purports to repeal all state laws related to gambling, "to the extent they apply" to sports gambling that meets five requirements: (1) the gambling is conducted "at a casino or gambling house" in Atlantic City or "a running or harness horse racetrack"; (2) it consists of wagering by persons "situated at such location"; (3) the persons placing wagers are "21 years of age or older"; (4) "the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or

operation"; and (5) the gambling does not include wagers on "a collegiate sport contest or athletic event that takes place in New Jersey or a sport contest or collegiate athletic event in which any New Jersey college team participates." *Id.* at 219a-220a.

2. Respondents filed a new suit, arguing that the 2014 Act conflicts with Section 3702(1) by "licens[ing]" and "authoriz[ing] by law" sports gambling. In response, petitioners contended that the 2014 Act's partial repeal was consistent with Section 3702(1) as interpreted in *Christie I*. Because petitioners did not renew their constitutional challenges in the district court, the United States did not intervene. But it filed a statement of interest agreeing with respondents that the 2014 Act conflicts with Section 3702(1) because it "license[s]" and "authorize[s] by law" sports-gambling schemes. D. Ct. Doc. 57, at 10-16 (Nov. 19, 2014).

The district court entered summary judgment for respondents, holding that the 2014 Act is preempted by PASPA because it "authorize[s]" sports gambling. Pet. App. 76a-113a.

3. A divided panel of the court of appeals affirmed. Pet. App. 47a-75a. The court then granted rehearing en banc and affirmed by a 9-3 vote. *Id.* at 1a-46a.

a. The en banc court held that the 2014 Act conflicts with PASPA because it "authorize[s]" sports gambling. Pet. App. 12a-16a. The court explained that although the 2014 Act is "artfully couched in terms of a repealer," it "essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling." *Id.* at 14a. Focusing on the substance of the law rather than its form, the court concluded that the 2014 Act "is an authorization." *Ibid.*

In so holding, the en banc court acknowledged that some language in *Christie I* could be taken to suggest that, as a categorical matter, "a repeal is not an authorization" within the meaning of PASPA. Pet. App. 22a. "To the extent that [*Christie I*] took the position that a repeal *cannot* constitute an authorization," the en banc court "reject[ed] that reasoning" as "unnecessary dicta." *Id.* at 13a, 23a (emphasis added). The court explained that "a state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization' under PASPA." *Id.* at 23a.[3]

The en banc court also reaffirmed its "prior conclusion that PASPA does not run afoul of anti-commandeering principles." Pet. App. 18a; see *id.* at 18a-26a. The court emphasized that "PASPA does not command states to take affirmative actions," such as enacting or maintaining prohibitions on sports gambling. *Id.* at 23a. And the court rejected the district court's conclusion that PASPA puts states to "a strict binary choice" between repealing their prohibitions on sports gambling entirely or retaining total bans. *Id.* at 24a. Instead, the court explained that "PASPA allows states to 'choose among many different potential policies on sports wagering that do not include licensing or affirmative authorization by the State.'" *Id.* at 23a (brackets and citation omitted).

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[3] Because the en banc court held that the 2014 Act is an "authoriz[ation]" of sports gambling, it did not address respondents' alternative argument, also made by the United States in its amicus brief, that the 2014 Act "license[s]" sports gambling by permitting it only at state-licensed casinos and racetracks. Pet. App. 16a n.7.

The en banc court thus emphasized that its holding that the "specific partial repeal which New Jersey chose to pursue in its 2014 Law is not valid under PASPA does not preclude the possibility that other options may pass muster." Pet. App. 24a. The court did not attempt to draw a comprehensive line between partial repeals that would amount to authorizations and those that would not, finding it sufficient to conclude that wherever such a line might be drawn, "the 2014 Law overstepped it." *Ibid.*

b. Judge Fuentes, joined by Judge Restrepo, dissented, arguing that the 2014 Act does not conflict with Section 3702(1). Pet. App. 27a-34a. Judge Vanaskie dissented separately, reiterating his view that Section 3702(1) violates the Tenth Amendment. *Id.* at 35a-46a.

DISCUSSION

The court of appeals held that the 2014 Act conflicts with 28 U.S.C. 3702(1) and reaffirmed *Christie I*'s conclusion that Section 3702(1) is consistent with the Tenth Amendment. Petitioners do not seek further review of the court of appeals' statutory holding. Instead, they contend (Pet. i, 16-35) that Section 3702(1) violates the Tenth Amendment's anti-commandeering rule.[4] This Court denied certiorari petitions presenting that question in *Christie I*, and it should do so again here. The court of appeals correctly applied this Court's Tenth Amendment precedents in adhering to *Christie I*'s holding that Section 3702(1) does not unconstitutionally commandeer the States. That holding

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[4] The petition for a writ of certiorari in No. 16-477 adopts (at 8) the arguments in the petition in No. 16-476. Unless otherwise noted, references to "Pet." and "Reply Br." refer to the petition and reply brief in No. 16-476.

does not conflict with any decision of another court of appeals. To the contrary, no other circuit has even considered a case involving PASPA. And as in *Christie I*, the question petitioners seek to raise has limited practical significance because Section 3702(2)—which petitioners do not challenge—would prohibit the sports gambling purportedly authorized by the 2014 Act even if this Court agreed with petitioners that Section 3702(1) is invalid. Further review is therefore unwarranted.

A. The Court of Appeals Correctly Held That Section 3702(1) Does Not Violate The Tenth Amendment

Section 3702(1) does not violate the Tenth Amendment because it neither compels States to regulate according to federal standards nor requires state officials to administer federal law. Instead, Section 3702(1) *prohibits* States from operating sports-gambling schemes themselves or affirmatively licensing or authorizing private parties to do so. Those prohibitions are a permissible exercise of Congress's authority to regulate state activities and to preempt state laws that conflict with federal policy in an area within Congress's enumerated powers. Such prohibitions are commonplace and raise no commandeering concern. And that remains true where, as here, a particular state law conflicts with a valid federal prohibition as a result of a partial repeal of existing statutes rather than by virtue of an entirely new enactment. The inquiry focuses on the substantive interaction between state and federal law—not on the state law's formal label or the process by which it was adopted.

1. Section 3702(1) does not violate the Tenth Amendment because it does not compel States to enact or administer federally prescribed regulations

a. Under the Tenth Amendment, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz* v. *United States*, 521 U.S. 898, 925 (1997); see *New York* v. *United States*, 505 U.S. 144, 161-166 (1992). As this Court explained in *Printz*, that anti-commandeering principle precludes Congress from affirmatively requiring States to enact or administer federally prescribed regulatory requirements:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

521 U.S. at 935.

Congress may, however, *prohibit* States from enacting laws that conflict with federal policy. "A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981); see *ibid.* (collecting cases). The constitutionality of such legislation follows directly from the Supremacy Clause, which makes federal laws enacted pursuant to the Constitution "the supreme Law of the Land" and requires inconsistent State laws to give way. U.S. Const. Art. VI, Cl. 2.

Countless federal statutes thus expressly prohibit States from enacting laws with specified features or bar all state regulation in particular fields.[5] "Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Hodel*, 452 U.S. at 290.

In addition, Congress may "regulate[] state activities" by, for example, prohibiting States from issuing certain types of bonds, *South Carolina* v. *Baker*, 485 U.S. 505, 514 (1988), or from selling personal information obtained in connection with motor vehicle records, *Reno* v. *Condon*, 528 U.S. 141, 151 (2000). Such regulations of the States' own activities do not violate the anti-commandeering principle because they "do[] not require the States in their sovereign capacity to regulate their own citizens" and "do[] not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Ibid.*

b. This Court has found that a federal statute violated the Tenth Amendment's anti-commandeering

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[5] See, *e.g.*, 7 U.S.C. 1639i(b) ("[n]o State * * * may directly or indirectly establish under any authority or continue in effect" certain requirements related to food labeling); 12 U.S.C. 4122(a) ("[n]o State * * * may establish, continue in effect, or enforce" certain requirements related to mortgages); 15 U.S.C. 376a(e)(5)(A) ("[n]o State * * * may enact or enforce any law or regulation" placing specified restrictions on delivery of cigarettes or smokeless tobacco by common carriers); 23 U.S.C. 102(a) ("[n]o State * * * may enact or enforce a law" with the principal purpose of restricting access to highways by motorcycles); 49 U.S.C. 41713(b)(1) ("a State * * * may not enact or enforce a law, regulation, or other provision * * * related to a price, route, or service of an air carrier"); see also Br. in Opp. 24 n.4 (collecting other examples).

principle only twice, in *New York* and *Printz*. As the court of appeals held in *Christie I* and reaffirmed here, Section 3702(1) differs fundamentally from the statutes at issue in those cases because it does not impose an "affirmative command" or a "coercive either-or requirement" on States. Pet. App. 25a; see *NCAA* v. *Governor of N.J.*, 730 F.3d 208, 231-234 (3d Cir. 2013), cert. denied, 134 S. Ct. 2866 (2014).

The statute at issue in *New York* directed States either to take ownership of nuclear waste or to regulate the waste in accordance with Congress's instructions. 505 U.S. at 153-154. This Court invalidated that provision because Congress lacked authority "to impose either option as a freestanding requirement"—and, in particular, because the second option would have "presented a simple command to state governments to implement legislation enacted by Congress." *Id.* at 175-176. Similarly, the statute at issue in *Printz* required state law enforcement officers to conduct background checks in connection with the transfer of handguns. 521 U.S. at 903. Both statutes thus turned the States into agents of the federal government, forcing them to enact federally prescribed legislation or to execute federal law.

Section 3702(1) is different. It does not obligate States to enact any law or to implement or administer any federal regulatory requirement. "PASPA does not *require* or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law." *Christie I*, 730 F.3d at 231. Instead, portions of Section 3702(1) permissibly "regulate[] state activities," *South Carolina*, 485 U.S. at 514, by barring States themselves from "spon-

sor[ing], operat[ing], advertis[ing], [or] promot[ing]" sports-gambling schemes. 28 U.S.C. 3702(1). Other portions of the statute permissibly "pre-empt state laws regulating private activity," *Hodel*, 452 U.S. at 290, by prohibiting States from "licens[ing], or author-iz[ing] by law or compact," sports-gambling schemes. 28 U.S.C. 3702(1). And because PASPA "does not require the States in their sovereign capacity to regulate their own citizens," "does not require [the States] to enact any laws or regulations," and "does not require state officials to assist in the enforcement of federal statutes," it is, like the statute this Court upheld in *Condon*, "consistent with the constitutional principles enunciated in *New York* and *Printz*." 528 U.S. at 151.

2. The fact that Section 3702(1) prevents New Jersey from effectuating the specific partial repeal in the 2014 Act does not create a commandeering problem

a. In *Christie I*, petitioners argued that Section 3702(1)'s prohibition on state "authoriz[ation]" of sports gambling violates the Tenth Amendment because it requires States to maintain their existing prohibitions on sports wagering. 730 F.3d at 232. The court of appeals disagreed, explaining that Section 3702(1) prohibits only authorizations of sports gambling and thus would allow a State to "repeal its sports wagering ban" or to retain a ban while deciding "what the exact contours of the prohibition will be." *Id.* at 233. In opposing certiorari, the government similarly stated that Section 3702(1) does not "obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment" and instead leaves the State "free to repeal those prohibitions in whole or in

part." Br. in Opp. 11, *Christie* v. *NCAA*, 134 S. Ct. 2866 (2014) (Nos. 13-967, 13-979, and 13-980).

Seizing on those statements, petitioners asserted below that *any* law styled as a "partial repeal" cannot be an "authoriz[ation]" under PASPA and must be deemed consistent with Section 3702(1). Pet. App. 24a. Taken in context, that is plainly not what the court of appeals or the government meant in *Christie I*. The relevant provision of PASPA only prevents States from authorizing by law or licensing sports-gambling schemes. If New Jersey wishes to repeal its prohibition on sports gambling altogether and thereby remain silent with respect to such gambling, or to adopt a partial repeal that is not a *de facto* authorization (by, for instance, lifting state penalties on informal or social wagering), PASPA does not stand in its way. But the 2014 Act's partial repeal—which is specifically tailored to facilitate sports gambling at state-licensed casinos and racetracks—is no different from a positive enactment authorizing such gambling.

The court of appeals correctly recognized that common-sense point. The court explained that *Christie I* did not involve a partial repeal, much less a conditional and carefully gerrymandered partial repeal like the one in the 2014 Act. Pet. App. 13a-14a, 23a. The court emphasized that "[t]he presence of the word 'repeal' does not prevent [the court] from examining what the provision actually does." *Id.* at 14a. Focusing on substance rather than form, the court concluded that "a state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization' under PASPA." *Id.* at 23a.

The court of appeals did not, however, retreat from *Christie I*'s conclusion that "PASPA allows states to 'choose among many different potential policies on sports wagering that do not include licensing or affirmative authorization by the State.'" Pet. App. 23a (brackets and citation omitted). The court thus took pains to make clear that Section 3702(1) does not consign States to an all-or-nothing choice between leaving their existing prohibitions on sports gambling intact or repealing them altogether. *Id.* at 13a, 23a, 24a. The court held only that the "specific partial repeal which New Jersey chose to pursue in its 2014 Law" constituted a prohibited authorization. *Id.* at 24a.

b. Petitioners do not seek this Court's review of the court of appeals' statutory holding that the 2014 Act is, in substance, an "authoriz[ation] by law" of sports gambling. Pet. App. 14a; see Pet. i (presenting only petitioners' Tenth Amendment claim); 16-477 Pet. i (same). Petitioners are correct to abandon their statutory argument. That argument would have eviscerated PASPA, because virtually any licensing or authorization of sports-gambling schemes could be reformulated as a partial repeal.

For example, the 2012 Act at issue in *Christie I* placed sports gambling under New Jersey's existing regulatory framework for casino and racetrack gambling. Petitioners conceded that the 2012 Act conflicted with Section 3702(1)—indeed, it was "precisely what PASPA says the states may not do." *Christie I*, 730 F.3d at 227; see Senate Report 5 (explaining that PASPA was intended to block pending proposals to authorize "casino-style sports books"). Yet the 2012 Act could have been reformulated as a statute "partially repealing" prohibitions on sports gambling to the

extent they apply to casinos and racetracks that conduct sports gambling in conformity with the regulatory framework governing their other gambling activities. And virtually any other license or authorization could likewise be reframed as a partial repeal conditioned on the satisfaction of specified requirements.

Conversely, although formally styled as a partial repeal, the 2014 Act is equivalent to a statute providing that, notwithstanding the State's general prohibition of sports gambling, "casinos and racetracks are authorized to conduct sports gambling" if they satisfy the 2014 Act's requirements governing the location of the gaming, the persons who may place wagers, and the sporting events that may be the subject of betting. And like the 2012 Act, the 2014 Act accomplishes "precisely what PASPA says the states may not do" by approving gambling at state-licensed casinos and racetracks. *Christie I*, 730 F.3d at 227. Accordingly, like the 2012 Act, the 2014 Act is an "authoriz[ation] by law" foreclosed by Section 3702(1). Indeed, as the United States argued in the court of appeals, the 2014 Act also "license[s]" sports-gambling schemes, 28 U.S.C. 3702(1), by effectively expanding the gambling licenses held by casinos and racetracks to include sports wagering. Gov't C.A. Br. 10-13.

c. Having abandoned their challenge to the court of appeals' statutory holding, petitioners now contend that applying Section 3702(1) to invalidate a state statutory scheme created through a partial repeal like the 2014 Act fundamentally transforms the Tenth Amendment analysis and raises new constitutional questions not presented in *Christie I*. They are mistaken.

Petitioners' premise, which underlies virtually all of their arguments, is that "[t]o require [a] State to maintain *any* state law prohibition that it wishes to repeal is 'fundamentally incompatible with our constitutional system of dual sovereignty.'" Pet. 24 (citation omitted). Petitioners thus identify the asserted Tenth Amendment problem in these cases as the fact that a federal statute and a federal court have effectively required New Jersey "to maintain state-law prohibitions that its elected officials chose to lift." Pet. 3; see, *e.g.*, Pet. i, 20, 29; Reply Br. 3. But petitioners cite no decision embracing their view that a commandeering problem arises whenever federal law prevents a State from giving effect to any possible repeal of an existing state law, and such a rule would yield absurd results.

New York and *Printz* establish that "Congress cannot compel the States to enact or enforce a federal regulatory program." *Printz*, 521 U.S. at 935. Those decisions indicate that a federal statute would present Tenth Amendment problems if it purported to compel States to maintain a specific federally prescribed scheme regulating private parties. But that does not mean that *any* situation in which a federal statute prevents a State from giving effect to a particular repeal of state law violates the Tenth Amendment. "A wealth of precedent" confirms that Congress may, consistent with the Tenth Amendment, prohibit States from adopting laws with specified features. *Hodel*, 452 U.S. at 290. Once Congress has done so, a State's attempt to adopt a law with the prohibited features is validly preempted whether the State acts through an entirely new enactment or through a partial repeal of existing law.

For example, Congress has prohibited States from imposing any tax on electricity that "discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers." 15 U.S.C. 391. A State could not evade that prohibition by first adopting a nondiscriminatory tax and then, sometime later, partially repealing that tax to the extent it applied to in-state entities. And a State barred from taking that step could not be heard to complain (Pet. 24) that Section 391 violates the Tenth Amendment by requiring the State to maintain a law "that it wishes to repeal." Section 391 does not require the States to structure their tax laws in a specific way, or to leave any particular tax on the books. But it does validly preempt discriminatory taxes—even when the discrimination results from a partial repeal. Such preemption of a specific partial repeal does not unconstitutionally "commandeer" the States; rather it "follows directly from the Constitution's instruction that a state law may not be enforced if it conflicts with federal law." *Riley* v. *Kennedy*, 553 U.S. 406, 427 (2008).[6]

So too here. Section 3702(1) preempts state laws that "license" or "authorize by law" sports-gambling schemes. That provision neither freezes States' exist-

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[6] Equivalent examples could be constructed based on many other federal statutes that preempt state laws that differentiate between specified classes of entities. See, *e.g.*, 12 U.S.C. 25b(b)(1) (preempting certain laws that "directly or indirectly discriminate against national banks"); 12 U.S.C. 4122(b) (exempting from preemption certain laws "of general applicability to both housing receiving Federal assistance and nonassisted housing"); 15 U.S.C. 6733(b) (barring differential treatment of certain insurers); 15 U.S.C. 6760(b)(1) (same); 31 U.S.C. 313(f)(1) (same); 47 U.S.C. 332(c)(3)(A) (exempting from preemption certain regulations imposed "on all providers of telecommunications service").

ing gambling prohibitions in amber nor requires that the States enact or maintain any particular law. It simply means that a State may not structure its laws in a manner that "license[s]" or "authorize[s] by law" sports gambling. And just as 15 U.S.C. 391 and other similar provisions do not unconstitutionally commandeer the States even though they prohibit certain specific repeals of existing state laws, Section 3702(1) poses no Tenth Amendment problem even though it prevents New Jersey from enacting the "specific partial repeal" in the 2014 Act. Pet. App. 24a.[7]

d. Petitioners object (Pet. 31-34) to the court of appeals' failure to articulate a comprehensive rule establishing the point at which "a partial repeal of a sports wagering ban amounts to an authorization" under PASPA. Pet. App. 24a. For example, although the court suggested that PASPA would not foreclose "a state's partial repeal of a sports wagering ban to allow *de minimis* wagers between friends and family," *ibid.*, petitioners criticize (Pet. 33) the court's failure to specify whether PASPA would allow hypothetical laws decriminalizing "office pool wagering," "sports wagering by individuals of any age, rather than just those over 21," or "the operation of sports pools at bars, law offices, restaurants, or judicial offices instead of casinos."

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[7] Petitioners emphasize (*e.g.*, Pet. i, 2-3; Reply Br. 3, 5-6) the district court's grant of injunctive relief. But an injunction enforcing a valid federal law presents no independent commandeering concern. "[T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply." *New York*, 505 U.S. at 179.

Petitioners' criticism is misplaced. The court of appeals should not be faulted for declining to opine on hypothetical cases or laws that are not presented here and that may never arise at all. This Court commonly reserves judgment on questions that are not necessary to its resolution of the case before it. See, *e.g.*, *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1977 n.4 (2016); *Alice Corp.* v. *CLS Bank Int'l*, 134 S. Ct. 2347, 2357 (2014). Nor are petitioners well positioned to invoke the asserted lack of clarity in the court of appeals' interpretation of Section 3702(1) as a basis for further review, because petitioners themselves have now eschewed their statutory arguments to focus exclusively on their Tenth Amendment claim. Pet. i; 16-477 Pet. i.[8]

B. The Question Presented Does Not Warrant This Court's Review

1. Petitioners do not contend that the court of appeals' decision upholding Section 3702(1) conflicts with any decision of another court of appeals. Indeed, although PASPA has been on the books for a quarter century, it has apparently given rise to only a handful

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[8] Petitioners assert (Pet. 33-34) that the court of appeals' decision is a "threat to state sovereignty" because it assertedly deprives the States of clear notice about what Section 3702(1) allows. But the clear-statement rule petitioners invoke is an incident of the Spending Clause; it has no application to Commerce Clause legislation like PASPA, which imposes unconditional limitations on state authority rather than inviting States to enter into a bargain with the federal government. See *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 576 (2012) (opinion of Roberts, C.J.). And any concern about notice is mitigated by PASPA's remedial provision, which authorizes only injunctive relief and thus creates no risk of financial liability for a State that contravenes Section 3702(1). 28 U.S.C. 3703.

of suits, all in the Third Circuit. See Br. in Opp. 19-20 & n.3. Apart from New Jersey's recent efforts to foster sports betting at the State's casinos and racetracks, only one other State has enacted legislation challenged under Section 3702(1): Delaware, which unsuccessfully argued that various forms of sports lotteries fell within PASPA's grandfathering clause, 28 U.S.C. 3704(a)(1). See *OFC COMM Baseball* v. *Markell*, 579 F.3d 293, 301-304 (3d Cir. 2009), cert. denied, 559 U.S. 1106 (2010). No other State has enacted legislation claimed to conflict with PASPA, and even petitioners' amici States do not profess any desire to enact laws comparable to the 2014 Act. The absence of a conflict on the question presented and the paucity of PASPA litigation of any kind counsel against this Court's review.[9]

2. The limited practical consequences of the question presented confirm that this Court's review is unwarranted. Petitioners' commandeering challenge is directed solely at Section 3702(1), the provision of PASPA that disallows States from licensing or authorizing sports-gambling schemes. But another provision of PASPA, Section 3702(2), independently prohibits private parties from "sponsor[ing], operat[ing], advertis[ing], or promot[ing]" sports-gambling schemes "pursuant to [state or local] law or compact." 28 U.S.C. 3702(2). Petitioners have not questioned the constitu-

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[9] The petitioner in No. 16-477 errs in asserting (Pet. 11-12) that the court of appeals' decision conflicts with the decisions of three state courts of last resort. The cited decisions simply quoted *New York* and *Printz*; none involved a Tenth Amendment challenge to a federal statute. See *Reed-Kaliher* v. *Hoggatt*, 347 P.3d 136, 141 (Ariz. 2015); *Ter Beek* v. *City of Wyoming*, 846 N.W. 2d 531, 538 (Mich. 2014); *State* v. *Nelson*, 195 P.3d 826, 834 (Mont. 2008).

tionality of Section 3702(2) under the Tenth Amendment, and they could not plausibly do so because the Tenth Amendment does not "shield[] the States from pre-emptive federal regulation of *private* activities affecting interstate commerce." *Hodel*, 452 U.S. at 291.

Accordingly, even if this Court granted review and agreed with petitioners that Section 3702(1) violates the Tenth Amendment, the sports-gambling schemes purportedly authorized by the 2014 Act would still be prohibited by Section 3702(2). The court of appeals made that point explicit in *Christie I*, observing that "even if" Section 3702(1) "were excised from PASPA, [Section] 3702(2) would still plainly render the [2012 Act] inoperative by prohibiting private parties from engaging in gambling schemes pursuant to that authority." 730 F.3d at 236. That basic point remains true. As in *Christie I*, the fact that Section 3702(2) independently prohibits the gambling New Jersey seeks to authorize substantially diminishes the practical significance of the question petitioners ask this Court to answer. The Court should therefore treat that question the same way it did in *Christie I* and again decline further review.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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RECORD AND BRIEF

Nos. 16-476 & 16-477

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IN THE

Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Respondents.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE AMERICAN GAMING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The American Gaming Association (AGA) is a non-profit trade association whose members participate in the U.S. commercial and tribal gaming industry, a highly regulated, $240 billion industry that supports 1.7 million jobs and provides $38 billion in tax revenue across forty States. On behalf of its members, the AGA works with law enforcement, elected officials, and regulatory agencies to combat illegal gambling and promote next-generation regulatory regimes.

The AGA is particularly concerned with the prevalence of illegal sports gambling in the United States, much of which takes place undeterred by the failed Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3701 *et seq.* This federal law prohibits all but four States from authorizing or licensing sports betting in any form, and prohibits all States but Nevada from allowing traditional, single-game sports betting. As interpreted by the Third Circuit, PASPA leaves States with few, if any, options to alter the state gambling laws prohibiting sports betting that existed in 1992 when PASPA was enacted.

But, rather than reduce sports betting, PASPA has simply allowed it to flourish underground, benefitting criminal elements and creating a thriving black mar-

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[1] Pursuant to Rule 37.6, the AGA affirms that no counsel for a party authored this brief in whole or in part and that no person other than the AGA, its members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of the AGA's intention to file this brief. The parties have consented to the filing of this brief, each in a separate writing that is being filed concurrently with this brief.

ket. Since PASPA's enactment, trillions of dollars have been wagered illegally on sporting events. In the last Super Bowl alone, $4.2 billion was wagered, and 97% of those bets were made illegally. Fact Sheet, Am. Gaming Ass'n, 80% of Super Bowl Viewers Say: Change Sports Betting Law 1 (2016), https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/56ba2198044262374b0347db/1455038873445/AGA+Sports+Betting+Fact+Sheet+.pdf. Much of this revenue generated by illegal sports gambling is used to fund organized crime and other illicit activity, such as drug and human trafficking, money laundering, and racketeering.

The AGA—like the majority of sports fans and many leaders in law enforcement—believes it is time to reexamine the nation's outdated sports-betting laws. Through its Sports Betting Task Force and Illegal Gambling Advisory Board, the AGA has proposed legal and regulatory reforms to combat illegal gambling markets through tough and sensible regulation. Replacing the black market with a regulated industry will better protect consumers and the integrity of professional and amateur sports while generating billions of dollars in tax revenue to benefit local communities.

PASPA, as interpreted by the Third Circuit, forecloses States from devising effective, modern regulations to address sports betting—and, in the process, commandeers the States' legislatures and enforcement apparatuses. This commandeering severely hinders the AGA and its members in their efforts to make sports betting safer and more transparent. It is also patently unconstitutional, necessitating this Court's immediate review.

SUMMARY OF THE ARGUMENT

The fundamental legal question presented by these Petitions is whether a federal court can, consistent with federalism and dual sovereignty, enjoin a State from passing a law that neither violates the Constitution nor addresses any matter preempted by federal law. The Third Circuit's conclusion that federal courts have this unprecedented power is irreconcilable with this Court's well-established anti-commandeering jurisprudence, and severely detrimental to state efforts to combat sprawling black markets for illegal sports gambling. The Petitions, therefore, present a question of exceptional national importance requiring this Court's intervention.

I. This Court has consistently held that the federal government may not "compel the States to require or prohibit" certain acts, *New York v. United States*, 505 U.S. 144, 166 (1992), nor "control or influence the manner in which States regulate private parties," *South Carolina v. Baker*, 485 U.S 505, 514 (1988), nor "require the States ... to regulate their own citizens," *Reno v. Condon*, 528 U.S. 141, 151 (2000). Thus, past attempts to coerce States into implementing federal law have been struck down as violative of the Tenth Amendment and principles of federalism.

PASPA does exactly that. As interpreted by the Third Circuit, PASPA requires forty-six States to maintain and enforce state laws prohibiting sports betting that were on the books at the time of PASPA's adoption in 1992—regardless of public opinion or the law enforcement or economic needs unique to each State. While Congress could have regulated or prohibited sports betting as a matter of federal law, it chose not to. Instead, PASPA in effect ensures that sports betting continues to violate *state law*.

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This distinction is constitutionally dispositive. Whereas federal prohibitions are enforced by federal agencies expending resources, state prohibitions are the responsibility of the States. By paralyzing States' efforts to modernize their sports-betting laws, PASPA commandeers the States to maintain laws and enforcement mechanisms that their citizens may prefer to abolish. Congress has no authority to dictate state law in this manner. *See, e.g., Printz v. United States*, 521 U.S. 898, 904–05 (1997).

The Third Circuit concluded that PASPA does not unconstitutionally commandeer state legislatures because it does not "*require* or coerce the states to lift a finger" or "take affirmative action" to *enact* any particular state law. Pet. App. 23a, 156a. To the contrary, PASPA violates the Tenth Amendment precisely because it prevents States from repealing or amending their own laws that their citizens no longer support. Just as Congress cannot force a State to regulate its own citizens, the federal government cannot prohibit a State from deregulating its own citizens.

II. Not only is PASPA unconstitutional; it deprives States of vital tools needed to combat the thriving and violent black market for illegal gambling. As construed by the Third Circuit, PASPA forces States to maintain laws that were unwise in 1992 and are dangerously outdated today. This creates at least four significant problems.

First, the Third Circuit leaves in place an unconstitutional law that has enabled a violent and expanding black market. PASPA has failed to prevent people from gambling on sports; all the Act has done is drive sports gambling underground. The AGA estimates that Americans illegally gamble $149 billion on sporting events each year, and much of that revenue is used to fund organized crime. By contrast, such

black markets for illegal sports gambling simply do not exist in countries with legal sports betting markets. When presented with a safe, legal market or an illicit alternative, consumers will almost always choose the former.

Second, the Third Circuit's decision forces States to ignore the growing public consensus in favor of reforming outdated sports-betting laws. Today, two-thirds of American sports fans and leading voices within law enforcement agree that States should have the autonomy to regulate intrastate sports betting, just as States currently have the authority to regulate lotteries, race betting, and casino-style gaming, including on the Internet.

Third, replacing PASPA's top-down mandate with state-by-state regulation will benefit consumers, law enforcement, professional and amateur sports, and local communities. First, and most importantly, experience in Nevada and other nations shows that regulated sports-betting markets all-but eliminate illegal sports gambling. Second, transitioning to regulated markets enables States to protect citizens who wager on sports, using consumer protection laws and other measures designed to prevent exploitation and abuse. Third, law enforcement can use the data and revenue generated by regulated sports betting to prevent and investigate corruption (such as match-fixing). Fourth, regulating sports betting will allow States to generate tax and tourism revenue to fund law enforcement, social services, and other matters of vital concern to States and local communities.

Finally, the Third Circuit's decision will deter other States from updating their sports-gaming laws. The Third Circuit's *en banc* decision creates substantial uncertainty regarding what—if any—reforms to state law PASPA permits. This will strongly discourage

other States from making attempts to modernize their own sports-gaming laws, allowing black markets for sports betting to grow, and the criminal enterprises they fund to spread.

States need the flexibility to address the economic and public safety implications of illegal gambling—issues of utmost local concern. If Congress wants to enact a federal prohibition that would be the responsibility of federal authorities to enforce, it has the power to do so, and it would be fully accountable for the policy consequences. But what the federal government cannot do is require the existence of *state* laws and commandeer *state* resources to enforce a misguided policy that the States want to abolish.

I. PASPA FORCES STATES TO ENFORCE A FAILED FEDERAL PROHIBITION ON SPORTS BETTING.

A State's ability to decide what its law is (and is not) is a "quintessential attribute of sovereignty" and precisely "what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). Indeed, protecting a State's autonomy to enact, enforce, and repeal its own laws as it sees fit protects individual rights and promotes democratic accountability. *New York*, 505 U.S. at 168–69, 181. By adopting a system of dual sovereignty, our Constitution embraces these principles and rejects a "'central government that would act upon and through the States' in favor of 'a system in which the State and Federal Governments would exercise *concurrent* authority over the people.'" *Alden v. Maine*, 527 U.S. 706, 714 (1999) (emphasis added) (quoting *Printz*, 521 U.S. at 919–20); *see* The Federalist No. 15, at 108 (A. Hamilton) (Clinton Rossiter ed., 1961).

For these reasons, this Court has "always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel *the States* to require or prohibit those acts." *New York*, 505 U.S. at 166 (emphasis added). Thus, for well over a century, it has been a central tenet of this Court's so-called anti-commandeering jurisprudence that Congress cannot "compel[ ] [the States] to enact and enforce a federal regulatory program," *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981), or "require the States to govern according to Congress' instructions," *New York*, 505 U.S. at 162. *See Coyle v. Smith*, 221 U.S. 559, 574–75 (1911) (Congress may not prohibit State from changing location of its capitol).

Thus, in *New York*, this Court held that Congress could not force States either to take title to low-level radioactive waste generated within their borders or to adopt federal standards regulating such waste. 505 U.S. at 174–77. Similarly, in *Printz*, this Court determined that Congress could not compel state law enforcement officials to perform background checks for would-be purchasers of firearms. 521 U.S. at 904–05. Even in cases in which this Court has rejected anti-commandeering challenges to federal law, it has stressed that Congress may not command States to "promulgate and enforce laws and regulations," *FERC*, 456 U.S. at 761–62, control or influence the manner in which States "regulate private parties," *Baker*, 485 U.S. at 514, or "require the States ... to regulate their own citizens." *Reno*, 528 U.S. at 151.

PASPA does precisely that. The Act enshrines a federal policy that, with a few grandfathered exceptions, makes sports betting illegal nationwide. But, rather than enacting this policy directly as a matter

of federal law, PASPA prohibits *States* from "sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authoriz[ing]" sports betting. 28 U.S.C. § 3702(1). As interpreted by the Third Circuit, PASPA not only prohibits States from enacting laws that *authorize* sports gambling; it forces States to maintain laws (and accompanying enforcement apparatuses) that *prohibit* the practice. Pet. App. 10a–16a. Although the Third Circuit left open the possibility that *some* repeals or amendments may be acceptable, it gave no guidance to States on what those acceptable revisions may be. The practical effect of the Third Circuit's decision may well be to freeze in place all state laws prohibiting sports betting as they existed in 1992 (when PASPA was enacted) and lead States to hesitate to repeal or amend those laws, regardless of the will of their citizens or changing circumstances in their State.

This commandeers states' legislative and enforcement power. Under the Third Circuit's analysis, PASPA *compels* States to regulate their citizens in accordance with a federal standard. That is a textbook example of commandeering prohibited by the Tenth Amendment. *New York*, 505 U.S. at 166.

Absent PASPA, state laws addressing sports betting could be repealed or amended by the same state legislatures that enacted them. Thus, "[i]f the citizens of New [Jersey] ... do not consider that [prohibiting sports betting] is in their best interest, they may elect state officials who share their view." *Id.* at 168. And in fact, the voters of New Jersey have done just that. In 2011, 64% of New Jersey voters supported a referendum repealing New Jersey's constitutional ban on sports betting. Pet. App. 4a. In the years that followed, large majorities in the General Assembly and state Senate approved bills authorizing and, lat-

er, repealing the prohibition of sports betting at certain facilities within the State. Pet. App. 82a, 84a. The manifest purpose of these laws was to combat the "flourishing" black market for sports betting in New Jersey and to stimulate economic growth—both of which are matters of fundamental importance to the State and its citizens. *See* Pet. App. 10a–11a, 126a.

Under the Third Circuit's analysis, PASPA not only prevents the State of New Jersey from enacting laws that implement the policy preferences of nearly two-thirds of its citizens on these important issues; it commandeers the State legislature by forcing New Jersey to maintain state laws consistent with PASPA's federal standard. Thus, PASPA places the New Jersey Code in a time capsule of sorts, to be opened only by some future session of Congress. Until New Jersey receives such congressional imprimatur, the State must keep on its books a law it no longer wants and take responsibility for a policy it wishes to abandon.

It is axiomatic that Congress lacks authority to define state law, and the reasons for this rule transcend formalism or mere tradition. Depriving the body that enacted a law of the ability to repeal or amend that law defeats the purpose of representative democracy. As this Court recognized in *New York*, "[a]ccountability is ... diminished when ... state officials cannot regulate in accordance with the views of the local electorate." 505 U.S. at 168–69. The people of New Jersey, having overwhelmingly approved a ballot initiative allowing the legislature to repeal the State's sports betting prohibitions, will understandably be frustrated to learn that these state-law restrictions remain in effect. State officials will "bear the brunt of public disapproval, while the federal offi-

cials who devised [PASPA] remain insulated from the electoral ramifications of their decision." *Id.*

There is no dispute that Congress cannot directly compel New Jersey to enact a prohibition on sports betting. *See id.* at 166. It should follow, then, that Congress may not prevent New Jersey from repealing its sports-betting prohibition. After all, "preventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring); *see also United States v. Butler*, 297 U.S. 1, 74 (1936) (Congress "may not indirectly accomplish" what it cannot accomplish directly).

The Third Circuit's contrary holding rests on the mistaken premise that PASPA does not commandeer state sovereignty because the law "does not command [the] states to take affirmative action." Pet. App. 23a. In other words, the Third Circuit suggests that prohibiting a State from repealing existing legislation is constitutionally different from requiring a State to enact new legislation. But this is akin to saying that shackles are not a restraint because they do not require the wearer to walk. The problem with PASPA is that it prohibits States from "tak[ing] affirmative action" to repeal or amend state laws their citizens no longer support. In so doing, PASPA necessarily commandeers state legislatures—it forces them to keep undesired state laws on their books. This subordination of state legislative authority to federal policy preferences treats the New Jersey Legislature as an outpost of Congress, and violates the Tenth Amendment.

PASPA also commandeers state enforcement mechanisms. Regardless of whether New Jersey takes

steps in a particular case to enforce its gambling laws, those laws will necessarily deter activity that the State wants to permit.

II. PASPA PREVENTS STATES FROM COMBATING ILLEGAL GAMBLING AND ORGANIZED CRIME.

The Third Circuit's decision is not just wrong; it is dangerous because it deprives States of the authority to combat illegal gambling. Although PASPA was passed with the salutary purpose of "stop[ping] the spread of ... sports gambling" and "maintain[ing] the integrity of our national pastime," S. Rep. No. 102-248, at 4 (1991), the Act does exactly the opposite. It enables an expanding black market and deprives law enforcement of the regulatory tools needed to address corruption and protect consumers. The Act also compels States like New Jersey to maintain outdated sports-betting laws enacted at a time when no one could imagine the Internet as a channel for illegal gambling. Because the Third Circuit's interpretation of PASPA did not include any guidance on the statute's scope, it ensures that PASPA is a major roadblock to state policymakers' efforts to experiment with solutions to the "widespread and violent" problem of illegal gambling.

A. PASPA Has Enabled A Thriving And Dangerous Black Market For Illegal Sports Betting.

PASPA has failed to stop people from betting on sports; all the Act has done is drive betters to black markets. Reliable studies have consistently found that Americans illegally wager hundreds of billions of dollars on sports every year. For example, as early as 1999, a federally commissioned study estimated that the market for illegal sports betting was between $80

billion and $380 billion per year, compared with just $2.3 billion wagered legally in Nevada. Nat'l Gambling Impact Study Comm'n, *Final Report* 2-14 (1999), http://govinfo.library.unt.edu/ngisc/reports/2.pdf. More recent reports estimate the annual market for illegal sports gambling to range from $149 billion to $500 billion. *See* Fact Sheet, Am. Gaming Ass'n, Sports Betting FAQs 1 (2016), https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/56ba2181e707eb3d66686949/1455038849402/AGA-SportsBettingInAmerica-FAQ.pdf (hereinafter "*Sports Betting FAQS*").

Taking the $149 billion figure as a conservative estimate, the market for illegal sports betting in the United States last year was greater than the revenue of 491 of the *Fortune* 500 companies, and roughly equal to the combined revenue of Microsoft, Goldman Sachs, and Bristol-Myers Squib. Fortune Mag., *Fortune 500*, http://beta.fortune.com/fortune500/list (last visited Nov. 14, 2016). Americans' gambling habits are particularly concentrated around the nation's most popular sporting events. Americans wagered an estimated $4.2 billion on Super Bowl 50; 97% of those bets were made illegally. *Sports Betting FAQs*, at 1. Similarly, Americans wagered an estimated $9.2 billion on the 2016 NCAA men's basketball tournament, with only about 2.8% ($262 million) bet legally. Press Release, Am. Gaming Ass'n, March Madness Betting to Total $9.2 Billion This Year (Mar. 14, 2016), https://www.americangaming.org/newsroom/press-releasess/march-madness-betting-total-92-billion-year.

This black market quite simply does not exist in places, such as Nevada and the United Kingdom, where sports betting takes place legally rather than being prohibited outright. As the director of the

U.K.-based Sports Integrity Services reported at a law-enforcement summit hosted by the AGA, "[T]here is simply no demand for a black market" in the U.K. due to legalized market for sports betting in that country. Am. Gaming Ass'n Illegal Gambling Advisory Bd., *Law Enforcement Summit on Illegal Sports Betting: After-Action Report* 5 (2015) (hereinafter "*Law Enforcement Summit*"). And as demonstrated by subsequent presentations at the summit, transparent betting markets aid law enforcement, protect the integrity of sports, and have "shut[ ] down 85 percent of the illegal market overnight." *Id.* at 6, 10.

By contrast, illegal gambling in the United States enables and funds other illicit activity, including serious criminal enterprises. Criminologist Jay Albanese, for example, has reported that illegal gambling operations are ordinarily large, longstanding enterprises that use gambling proceeds to fund serious crimes, including money laundering, racketeering, human and drug trafficking, and extortion. Jay S. Albanese, *Illegal Gambling & Organized Crime: An Analysis of Federal Convictions in 2014*, at 4–5 (2015), http://stopillegalgambling.org/aga-assets/uploads/2016/03/Albanese_Illegal_Gambling_OC_Report_2014_cases_FINAL.pdf. The Chief of the FBI's Transactional Organized Crime Unit similarly remarked, "Most people don't understand the ties of organized crime to illegal sports betting. We see it every day at the FBI." *Law Enforcement Summit*, at 9. And in addition to funding organized crime, illegal sports-betting operations evade taxation (depriving the States of revenue), while their customers are effectively denied recourse to courts and consumer protection laws. *Infra* at 19–21.

As a consequence, leading voices in law enforcement agree that a policy shift is needed to address

this "widespread and violent" problem. *Law Enforcement Summit*, at 7. These leaders argue that illegal sports gambling could be more effectively curtailed if States had the ability to adopt sports-betting regulations tailored to meet the particular preferences and public safety concerns of their own citizens.

For example, Oakland County (Mich.) Sheriff Michael Bouchard, vice president of government affairs for the Major County Sheriffs' Association, stated, "We must bring illegal sports betting out of the criminal shadows. I think we need to regulate it. States should be allowed to opt in or out . . . ." *Id.* at 8. Colonel Mike Edmonson, superintendent of the Louisiana State Police, agreed that allowing States to legalize and regulate sports betting is "the smart thing to do." *Id.* And former Wisconsin Attorney General J.B. Van Hollen further stated, "Legalizing and regulating sports betting would help take money out of the black market and instead support legitimate business operations and strengthen game integrity." *Id.* at 10.

PASPA, however, paralyzes State efforts to modernize their sports-betting laws in this manner.

B. Public Attitudes Have Shifted In Favor Of Legalized Sports Wagering.

Dramatic changes in technology, professional sports, and public opinion have occurred since PASPA was adopted nearly a quarter-century ago. The Act does not address any of these changes, and does not give the States the flexibility they need to do so. Instead, States are made accountable for antiquated federal policy.

For example, at the time of PASPA's adoption, the World Wide Web was just three-years old, and the market for illegal sports betting consisted almost en-

tirely of small betting pools and brick-and-mortar, backroom sportsbooks. In the intervening years, the Internet has grown into a tremendous channel for commerce—both legal and illegal. A person in the United States can visit an offshore website and place a bet on virtually any American sporting event, just as easily as he or she could order a book from Amazon or a song from iTunes.

The sports world, too, has changed dramatically. Mixed-martial arts, a thriving form of professional sports that drives numerous legal and illegal bets, did not exist when PASPA was enacted, nor did several other sports leagues that are prominent in the United States today, including Major League Soccer and the Women's National Basketball Association. And all the while, sports betting has become far more socially acceptable.

In fact, public attitudes towards sports betting have shifted dramatically since 1992. A 1989 Gallup survey found that a majority of Americans opposed allowing States to legalize sports betting. Pew Research Ctr., *Gambling: As the Take Rises, So Does Public Concern* 12–13 (May 23, 2006), http://www.pewsocialtrends.org/files/2010/10/Gambling.pdf. Today, the opposite is true. Americans, particularly American sports fans, now generally support allowing States to decide for themselves whether to legalize and regulate sports betting within their borders. For example, in a Mellman Group survey of people who planned to watch the 2016 Super Bowl, 66% of respondents favored allowing States to decide whether to permit sports betting, while only 25% opposed such a change. Memorandum from the Mellman Grp. to the Am. Gaming Ass'n, Executive Summary of Our Recent Super Bowl Polling 2 (Feb. 2, 2016), https://static1.squarespace.com/static/5696d0f14bf118

aff8f1d23e/t/56b53fb8f8baf38a1584cb20/1454718905429/16mem205-f+public+Super+Bowl.pdf. The percentage of respondents in the survey who "strongly" favored permitting sports betting (48%) was nearly triple the percentage of respondents who "strongly" opposed change (17%). *Id.* In fact, support for regulated sports betting was consistent regardless of the respondent's age, income, gender, party affiliation, or religion. *Id.*

The public's support for legalized sports betting is further demonstrated by Americans' betting habits. It is estimated that over 40 million Americans bet on a sporting event within the last year. Nielsen Sports, *Legal Sports Betting: What It Would Mean for NFL TV Partners & Advertisers* 8 (Sept. 2016), https://www.americangaming.org/sites/default/files/Nielsen_NFL_Betting.pdf. Another study found that half of all respondents who watch at least two National Football League games per week had bet—most often illegally—on sports in the preceding year). The Mellman Grp., *National Super Bowl Survey* tbl.2-1 (Jan. 25–28, 2016).

This growing acceptance of sports betting co-occurred with a period of dramatic growth in the gaming industry. Since PASPA's enactment, revenue from commercial gaming has increased from $9.72 billion in 1992 to $38.54 billion last year—a 266% increase. Over that same time period, the number of states with commercial casinos has tripled from eight in 1992 to twenty-four today. Tribal gaming has seen an even more dramatic surge in growth. In 1992, just a handful of states with Class III Indian casinos were in operation. Today, tribal gaming is in twenty-eight states across the country and revenues reached nearly $30 billion last year—an increase of 1,731% from 1992 when total revenues at Class II and III casinos

were just $1.63 billion. *See Gross Annual Wager*, Int'l Gaming & Wagering Bus. Mag., Aug. 5, 1994.[2]

In addition to the public writ large, States themselves want to experiment with sports betting as a means of combating crime, incentivizing tourism, and generating tax revenue. *See* Joe Drape, *Cash-Hungry States Eye Sports Betting, to Leagues' Dismay*, N.Y. Times (Mar. 27, 2013), http://www.nytimes.com/2013/03/28/sports/more-states-look-to-get-in-the-sports-betting-game.html; *see also* Daniel L. Wallach, Introduction, Game-Changers: The States' Big Gamble on Legalized Sports Betting 27 (Aug. 10, 2014), http://www.bplegal.com/webfiles/pdf/game_changer.pdf. Yet under the Third Circuit's opinion, States are not only precluded by PASPA from undertaking most alternative approaches to sports wagering, but have no guidance regarding which approaches are permissible and which will simply lead to expensive and ultimately unsuccessful litigation. PASPA thus effectively prevents States from any experimentation and instead forces them into the service of an outdated and failed federal prohibition.

To be sure, if Congress wishes to enact a law that runs contrary to the interests of the public, it may try to do so. But enforcement mechanisms are constitutionally significant. And what the federal government cannot do is pass the buck to the States, commandeer their enforcement apparatuses, and make them responsible for a policy they wish to eliminate.

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[2] Data on the current size of the gaming industry gathered from state gaming commissions and control boards and the National Indian Gaming Commission.

C. A Blanket Prohibition On Sports Betting Interferes With States' Traditional Authority Over Gaming.

By compelling States to enforce a federal policy on sports betting, PASPA deprives States of any flexibility to address the mounting evidence and an emerging consensus that legalized sports betting is a more effective way to combat illegal gambling and associated crimes than the total prohibitions maintained by many States under PASPA's framework today.

This is not only unconstitutional but highly unusual. Traditionally, gaming regulation has been a matter of state and local concern. With the exception of PASPA, Congress historically has limited the federal role in this area to supporting the States' enforcement of their own gaming laws. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187 (1999) (federal policy is "to defer to, and even promote, differing gambling policies in different States"). For example, the Illegal Gambling Business Act (IGBA), 18 U.S.C. § 1955, authorizes the federal prosecution of multi-state illegal gambling conspiracies, but does not provide a federal definition of "illegal gambling business." Instead, it prohibits only activities that operate in violation of *state* anti-gambling laws. *Id.* § 1955(b)(1)(i). Enacted in 1961 to target La Cosa Nostra, the federal Wire Act, 18 U.S.C. § 1084, similarly exists to prosecute illegal sports betting activities that are beyond the reach of any one State. Thus, with the exception of PASPA, Congress historically has recognized that approaches to gaming implicate important and complex questions of public health, safety, and morality best addressed by States.

PASPA contradicts this tradition of federal deference to state gaming laws, which would allow States,

working in coordination with local law enforcement and sports leagues, to develop safe and effective sports-betting regulations that accord with local opinion and local needs. As construed in *Christie I*, PASPA at least retained some potential to allow States limited discretion to decide on the contours of their gambling laws through determining which laws to repeal and which to maintain. Under the *en banc* Third Circuit's analysis in *Christie II*, however, PASPA effectively eliminates all meaningful opportunity for State participation in shaping the contours of regulation of sports gaming by declaring New Jersey's partial repeal unlawful, and providing no guidance regarding how PASPA will apply to any future state laws.

D. The Third Circuit's Decision Creates Uncertainty That Will Deter States From Attempting Popular And Necessary Regulatory Reforms.

There are manifold benefits to allowing States to reform their sports-betting laws to reflect modern technology, public opinion, and local economic and law enforcement needs.

For example, permitting sports betting to occur legally will better protect consumers. People who place bets in an illegal market cannot rely on consumer protection laws or even basic principles of contract enforcement. As a result, those citizens—particularly low-income and otherwise disadvantaged individuals—are susceptible to exploitation. Removing sports betting from the shadows will allow States to better protect these individuals, by enabling them to rely on general consumer protection laws and to enforce gaming contracts in courts of law. In addition, States will be able to devise betting policies that are particular to specific sports, ensuring the best protections for

the consumers that wager on those events, and address public health concerns associated with problem gambling.

Conducting sports betting in the open will also permit local law enforcement to access vital information necessary to identify and prosecute match-fixing and organized crime. Gaming operators can "provide an early warning system" of "irregularities" that may be evidence of corruption. *Law Enforcement Summit*, at 6 (statement of Karl Bennison, Chief of Enforcement for the Nevada Gaming Control Board). For example, during the 2016 Australian Open tennis tournament, a legal sportsbook in that country identified an unusual amount of bets being placed on a mixed doubles match. This discovery led to allegations that a pair of tennis players purposefully lost their match as part of a gambling conspiracy. This scandal may have never been uncovered without the large amounts of data generated by lawful sports-betting operations. *See* Ben Rothenberg & James Glanz, *Match-Fixing Suspicions Raised at Australian Open After Site Stops Bets on Match*, N.Y. Times (Jan. 24, 2016), http://www.nytimes.com/2016/01/25/sports/tennis/match-fixing-australian-open-mixed-doubles-betting. html. By contrast, in the United States, where the vast majority of sports wagering occurs on black markets—and outside law enforcement's view—match-fixing is usually uncovered inadvertently and only after the damage has been done. Brian Tuohy, *Larceny Games: Sports Gambling, Game Fixing and the FBI* 17 (2013) (reporting that 2007 point-shaving scandal involving NBA referee Tim Donaghy was discovered "purely by accident" from wiretaps in an "unrelated [FBI] organized crime case").

Finally, legalized sports betting offers States the potential to generate substantial revenue to benefit local communities. According to one report, in 2012, Nevada collected between $15 and $20 million in tax revenue from sports betting. *See* Drape, *supra*. The State, likewise, generates hundreds of millions of dollars in tourism revenue from people traveling to Nevada to wager on sports. *See* Wallach, *supra*, at 2 (reporting that 2014 Super Bowl, which was played in New Jersey, attracted 310,000 visitors and 106.2 million in non-gaming revenue to Las Vegas). By contrast, the hundreds of billions of dollars wagered in States where sports betting is illegal go largely untaxed, and are instead funneled to offshore companies and local criminal enterprises. If sports betting were legalized and activities related to it were taxed, state and local governments could direct a portion of the revenue to law enforcement, social services, and other matters of vital local interest.

State efforts to take these positive steps forward may well be chilled by the Third Circuit's *en banc* decision. Prior to that decision, other States were considering their own proposals to legalize and regulate sports betting. *See, e.g.*, *id.* at 27. Mississippi, for example, commissioned a Task Force on Internet Gaming and Sports Betting to consider the issue. State Task Force on Internet Gaming & Sports Betting, *Report on Internet Gaming and Sports Betting* 19 (Dec. 2014), http://msgaming.org/wp-content/uploads/2015/05/MGHA-Report-on-Internet-Gaming-and-Sports-Betting.pdf. But the Third Circuit's rulings have deterred those efforts. As the Mississippi Task Force concluded after *Christie I*, "[t]he steps to legalize Sports Betting are not known as of yet." *Id.* Two Third Circuit decisions later, the steps States can take to address illegal gambling and promote

safe, regulated wagering practices are even less clear. The Third Circuit provides States with no guidance regarding what—if any—reforms to state law will be tolerated.

For example, the court left open the possibility that PASPA might permit States to completely deregulate sports betting or to authorize "*de minimis* wagers between friends and family." Pet. App. 24a. However, between complete deregulation and friends-and-family betting pools, the Third Circuit provides no guidance whatsoever on the extent to which States may modernize their sports-betting laws.

This lack of clarity presents States with a strong disincentive to take action to combat illegal gambling within their borders, especially because States know that any attempt to amend their existing gaming restrictions will be met with fierce opposition from special interests, as this litigation powerfully demonstrates. The adverse consequences of this inaction will only grow. Illegal sports betting, particularly on the Internet, is undoubtedly a growth sector. And black markets for sports betting within the States, likewise, will continue to thrive under PASPA's broken regulatory framework. The emergence of new forms of sports betting like DFS, which state attorneys general have struggled to classify or regulate under existing gaming laws, further demonstrates the need for modern gaming regulations. *See, e.g.*, Zachary Shapiro, *Regulation, Prohibition, and Fantasy: The Case of FanDuel, DraftKings, and Daily Fantasy Sports in New York and Massachusetts*, 7 Harv. J. Sports & Ent. L. 277 (2016).

These Petitions, therefore, present fundamental questions about States' sovereignty to define their own laws and combat crime within their own borders. The Court should grant the Petitions because the

Third Circuit's decision is dangerous, both to the principle of dual sovereignty and to States struggling to combat the deleterious effects of black-market sports betting.

CONCLUSION

For the foregoing reasons, the Petitions should be granted.

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RECORD AND BRIEF

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CHRISTOPHER J. CHRISTIE,
Governor of New Jersey, et al.,

Petitioners,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Can the federal government circumvent this Court's commandeering cases, including *New York v. United States*, 505 U.S. 144 (1992), by prohibiting states from repealing their own laws that promote federal objectives, long after states and their voters have rejected them?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Competitive Enterprise Institute (CEI), and the Cato Institute respectfully submit this amicus brief in support of the Petitioners Governor of the State of New Jersey, David L. Rebuck, Frank Zanzuccki, New Jersey Thoroughbred Horsemen's Association, Inc., and New Jersey Sports & Exposition Authority.[1]

Founded in 1973, PLF defends limited government, property rights, and free enterprise in courts nationwide. PLF has extensive experience litigating constitutional and free enterprise issues as counsel and amicus curiae in this Court. *See, e.g.*, *Murr v. Wisconsin*, No. 15-214 (*cert. granted* Jan. 15, 2016); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (mem.); *Christie v. N.C.A.A.*, 134 S. Ct. 2866 (*cert. denied* June 23, 2014); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

The Competitive Enterprise Institute (CEI) is a nonprofit 501(c)(3) organization, incorporated and headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of amici's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation. In the last decade it has been extensively involved in the issue of federal gambling regulation, producing numerous studies and op-eds, and submitting testimony to Congressional committees—all aimed at enhancing consumer freedom and reducing the prevalence of black markets.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case is of central concern to *amici* because the anti-commandeering doctrine is essential to preserving federalism and, thereby, protecting individual liberty. *Amici* believe their legal and public policy experience will assist this Court in its consideration of this case.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

A federal statute compels New Jersey to continue prohibiting sports gambling, thus requiring the state to hold long after its voters decided to fold. In ruling that this does not run afoul of the prohibition against federal commandeering of states, the Third Circuit

decided an important question of federal law that has not been, but should be, settled by this Court. *See N.C.A.A. v. Governor of New Jersey*, 832 F.3d 389 (3d Cir. 2016). The Third Circuit's opinion undermines federalism and thereby threatens individual liberty by significantly limiting the scope of this Court's commandeering decisions. *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

The Professional and Amateur Sports Protection Act (PASPA) forbids states from "authoriz[ing]" sports gambling "by law." 28 U.S.C. § 3702. The Third Circuit interpreted this prohibition to bar states not just from affirmatively licensing sports gambling, but also from repealing or modifying their preexisting state prohibitions. *See N.C.A.A.*, 832 F.3d at 396-97. Accordingly, PASPA compels states to regulate their citizens according to Congress' instructions. The Third Circuit held that PASPA does not violate the anti-commandeering doctrine, however, because it does not require the states to enact prohibitions but instead to maintain existing prohibitions. *Id.* at 401-02 ("PASPA does not command states to take any affirmative actions[.]").

The petition raises an important question of federal law as the anti-commandeering doctrine is a key structural protection for federalism. *New York v. United States*, 505 U.S. at 161-66. In addition to maintaining the proper relationship between the federal government and the states, it protects individual liberty and promotes political accountability. *Id.* at 182-83. The importance of these constitutional issues calls for this Court to resolve the scope of the anti-commandeering doctrine.

The question presented is not merely important for academic or doctrinal reasons. PASPA reaches a broad range of sports gambling, with significant economic and social impacts. States need clear guidance from this Court about their valid regulatory options so that they may determine how best to protect and promote the interests of their residents.

REASONS FOR GRANTING THE PETITION

I

THE COURT SHOULD GRANT THE PETITION TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW

A. The Scope of the Anti-Commandeering Doctrine Is an Important Question That Should Be Resolved by This Court

"[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162; *see Brown v. E.P.A.*, 521 F.2d 827, 839 (9th Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977) ("states" cannot be "reduce[d] . . . to puppets of a ventriloquist Congress"). Thus, Congress may not "commandeer" states by compelling them to implement federal policy. *New York*, 505 U.S. at 161.

This anti-commandeering doctrine imposes important limits on federal power and protects core constitutional values. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as

the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868). Federalism, and the values it protects, could be down for the count if the federal government could impose its will on state governments. *See New York*, 505 U.S. at 162-63; *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

The Third Circuit's decision would limit the anti-commandeering doctrine by excluding from its reach cases where the federal government requires states to implement federal policy by forbidding them from changing pre-existing state laws. *See N.C.A.A.*, 832 F.3d at 401-02. If limited in this way, the anti-commandeering doctrine could easily be circumvented. *See infra* pages 12-14. In light of the important constitutional values advanced by the anti-commandeering doctrine, this Court should grant certiorari to determine its proper scope.

1. The Anti-Commandeering Doctrine Strengthens Federalism

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Federalism provides decentralized government "sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* at 458; *see* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987).

Federalism is not just an end in itself. Rather, it "is one of the Constitution's structural protections of liberty." *Printz*, 521 U.S. at 921; *see also Gregory*, 501 U.S. at 459 ("In the tension between federal and state power lies the promise of liberty."); The Federalist No. 51, at 323 (James Madison) (J. Cooke ed., 1961). Although it might seem counterintuitive, "freedom is enhanced by the creation of two governments." *Alden v. Maine*, 527 U.S. 706, 758 (1999). "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222 (2011).

As a vital component of federalism, the anti-commandeering doctrine advances individual liberty. It limits federal power by requiring the federal government to internalize the costs of its policies, rather than shifting them to the states. *See* Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 Harv. L. Rev. 1561, 1598 (2015); Brian Galle, *Does Federal Spending "Coerce" States? Evidence from State Budgets*, 108 Nw. U. L. Rev. 989, 996 (2014).

Federalism also promotes political accountability. *See FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992); *see also United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). The anti-commandeering doctrine promotes political accountability at both the federal and state levels by ensuring that voters hold the correct politicians accountable for unpopular policies. *See New York*, 505 U.S. at 182-83; Fahey, *supra* at 1598. If commandeering were allowed, state officials might take the fall for unpopular policies over which they have no control. Andrew B. Coan, *Commandeering*,

Coercion, and the Deep Structure of American Federalism, 95 B.U. L. Rev. 1, 8 (2015). Likewise, it would permit federal politicians to claim credit for addressing a serious national problem, while foisting the difficult questions of how to do so and at what cost on state officials. *Id.*; *see also* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2201 (1998). "The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).

Federalism also provides a means to discover better public policies through experimentation. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing states as "laboratories" which could experiment with novel solutions to vexing problems). If the federal government could commandeer the states, it could undermine this experimentation by imposing one-size-fits-all policies on states. *See* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563, 1581 (1994) ("To put it bluntly, we need long-term sources of regulatory creativity more than we need short-term efficiency.").

To preserve federalism, it is incumbent on the judiciary to determine the proper boundaries between federal and state power. *See Gregory*, 501 U.S. at 460-61; John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 1311, 1404 (1997) ("An absence of judicial review . . . over federalism questions

would abort the Framers' design."). "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring). Recognizing this importance, this Court has intervened when the federal government jumped offsides and commandeered states or their officials. *See Printz*, 521 U.S. 898; *New York*, 505 U.S. 144.

Judicial intervention is necessary because political checks are weak. Consequently, this Court has refused to accept state consent as a defense to commandeering claims. *New York*, 505 U.S. at 182 ("[T]he departure from the constitutional plan cannot be ratified by the 'consent' of state officials."). The anti-commandeering doctrine does not only protect states; by preserving federalism, it also protects individual liberty. *See* David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 Law & Contemp. Probs. 43, 62 (2014).

This Court has also steadfastly refused to balance the values protected by the anti-commandeering doctrine against proffered federal interests. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *New York*, 505 U.S. at 178. "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id.* at 187. However pressing the national problem may seem, "a judiciary

that licensed extraconstitutional government . . . would, in the long run, be far worse." *Id.* at 187-88.

The federal government has plenty of options in its play book to address pressing issues without eroding the Constitution's structural protections for federalism. It can directly regulate the activity itself and preempt contrary state regulation. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000). It can give states a choice of cooperating or ceding an area to federal regulation. *See New York*, 505 U.S. at 167-68. Or it can use its spending power under appropriate circumstances to entice states to cooperate. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603 (2012). These approaches do not lead to the same problems because any state participation must be truly voluntary. *See id.*; Ernest Young, *Federalism as a Constitutional Principle*, 83 U. Cin. L. Rev. 1057, 1074 (2015) ("Congress must *persuade*, not command, States to participate in cooperative federalism schemes."). But the federal government cannot simply command states to regulate their citizens in furtherance of federal policy.

2. The Third Circuit's Decision Limits the Anti-Commandeering Doctrine and Undermines the Values It Protects

The Third Circuit's decision construes PASPA to compel states to maintain prohibitions against sports gambling. *N.C.A.A.*, 832 F.3d at 396. It hints that states may have some options to change their own prohibitions, but refuses to give any guidance as to what those may be. *Id.* at 402 ("We need not . . . articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under

PASPA, if indeed such a line could be drawn."); *id.* at 407 (Vanaskie, J., dissenting) ("Noticeably, the majority does not explain why all partial repeals are not created equal or explain what distinguishes the 2014 Law from those partial repeals that pass muster."). The court's rationale, that a repeal is an implied authorization, "makes it clear that under PASPA as written, no repeal of any kind will evade the command that no State 'shall . . . authorize by law' sports gambling." *Id.* at 409 (Vanaskie, J., dissenting).

The Third Circuit's lack of guidance to states threatens state sovereignty and could lead to absurd results. As Judge Fuentes asked, in dissent, "[w]ould the State violate PASPA if it [first repealed all its existing prohibitions, then] later enacted limited restrictions regarding age requirements and places where wagering could occur?" *Id.* at 405 (Fuentes, J., dissenting). The unfortunate answer to Judge Fuentes' question is that no one knows.

Similarly, it is unclear whether the decision's odd interpretation of "authorize" extends beyond state legislatures. May state law enforcement officials focus limited resources on investigating and prosecuting only certain types of violations—for instance, bets involving minors or bets placed outside casinos and race tracks—without "authorizing" other gambling? Given this Court's insistence on clear rules where federal law intrudes on state sovereignty, the Third Circuit's lack of guidance is troubling. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238-39 (1985) (clear statement rule applies to federal statutes that may intrude on areas of traditional state authority).

Rather than provide much needed clarity, the Third Circuit threw a curveball at New Jersey's

commandeering concerns. It distinguished *New York* on the grounds that PASPA requires states to maintain existing prohibitions not to enact new ones. *N.C.A.A.*, 832 F.3d at 401-02.[2] *New York* does not support this distinction. *See* Matthew D. Mills, *The Failure of the Professional and Amateur Sports Protection Act*, 16 U. Den. Sports & Ent. L.J. 215, 219 (2014) (whether the federal government compels states to adopt a policy or forbids states from repealing it, the effects on federalism are the same). Equally troubling, the court's decision is not consistent with the principles underlying the anti-commandeering doctrine. "[P]reventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring); *see N.C.A.A. v. Governor of New Jersey*, 730 F.3d 208, 245 (3d Cir. 2013) (Vanaskie, J., concurring in part and dissenting in part).

Restricting the anti-commandeering doctrine to instances where Congress requires states to act undermines political accountability. Voters are just as likely to errantly blame state politicians, since the unpopular prohibition is imposed under state law. Coan, *supra* at 8. In either case, the state officials

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[2] The Third Circuit's reasoning bears a striking resemblance to the state consent defense that this Court rejected in *New York*. 505 U.S. at 182. A state's decision to enact state law prior to being commandeered could, at most, indicate that the state consented to it. Yet, as this Court recognized in *New York*, the Constitution's structural protections for federalism are too important to allow consensual violations to be ignored. *Id.* States cannot consent to a scheme that would violate the Constitution. Their ratification of the Constitution took away the states' ability to undermine it.

will be punished in subsequent elections, even though they would be powerless to change the policy. *Cf.* Christopher Carlberg, *Early to Bed for Federal Regulations: A New Attempt to Avoid "Midnight Regulations" and Its Effect on Political Accountability*, 77 Geo. Wash. L. Rev. 992, 1000 (2009) (explaining that "lame duck" politicians are not politically accountable because they no longer fear being voted out of office). Similarly, federal politicians could avoid accountability by shifting blame to hapless state officials. *Id.*

3. The Third Circuit's Decision Would Carve a Loophole into the Anti-Commandeering Doctrine

The Third Circuit's narrow interpretation of the anti-commandeering doctrine could impact far more than sports gambling. It creates a significant loophole in the doctrine that would allow the federal government to overextend its constitutional authority. This could fundamentally alter the relationship between the federal government and the states.

For instance, the federal government could compel states to continue implementing education policies well after they have proven unpopular. Previously, the need to convince states to cooperate has given them significant leverage to influence federal policy. *See* Young, *supra* at 1074-75 (explaining that state resistence to federal education policy forced a federal agency to change its requirements).

If, once adopted, the federal government could compel states to continue to implement particular policies, the political consequences could be far reaching. The federal government could dictate

curricula or testing requirements in those states that previously embraced the federal policy. *But see Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (recognizing education as an area of traditional state and local control). It could also require states to continue enforcing their current bathroom policies, whatever those may be. *Cf. G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted*, No. 16-273 (Oct. 28, 2016).

Limiting the anti-commandeering doctrine could also have severe repercussions in environmental policy. Federal-state cooperation on environmental regulation is particularly useful because states have greater local knowledge and more available enforcement officers. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1243-50 (1977). But if the federal government could indefinitely impose its will on states after they initially agree, that would threaten these cooperative federalism arrangements, with far reaching affects. *Cf.* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 Md. L. Rev. 1141, 1174 (1995).

The decision below invites these problems. For instance, if the federal government used its spending power to entice a state to adopt federal policy as its own, it could then forbid the state from ever changing its policy. When the state cried foul, the federal government could respond that, despite all appearances, the state isn't being commandeered because it was not compelled to adopt the policy originally. *See N.C.A.A.*, 832 F.3d at 401-02. Obviously, a state would be extremely wary to cooperate in

implementing federal environmental policy if it knows that, once it does, it may be permanently giving up its sovereignty. *Cf.* Stewart, *supra* at 1243-50. That would make cooperative federalism arrangements far more treacherous, not only undermining federalism but also the policy goals that these arrangements advance.

Perhaps the most politically salient issue which this narrow reading of the anti-commandeering doctrine could affect is marijuana legalization. Numerous states have experimented with decriminalizing marijuana, despite the federal prohibition against possession and distribution.[3] Erwin Chemerinksy, et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 81-89 (2015). This state experimentation is only possible because "the federal government cannot require states to enact *or maintain on the books* any laws prohibiting marijuana." *Id.* at 102-03 (emphasis added); *see* Austin Raynor, *The New State Sovereignty Movement*, 90 Ind. L.J. 613, 626 (2015); Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. Colo. L. Rev. 1105, 1107 (2014). But under the Third Circuit's rationale, the federal government is free to stop this process in its tracks, by forbidding states from any further liberalization. Jacob Sullum, *Victories for Eight of Nine Marijuana Initiatives Hasten the Collapse of Prohibition*, Reason.com (Nov. 9, 2016)[4]

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[3] Unlike the Controlled Substances Act, PASPA does not prohibit sports gambling under federal law. Instead, it operates directly on states, by forbidding them from authorizing sports gambling. 28 U.S.C. § 3702.

[4] http://reason.com/blog/2016/11/09/victories-for-eight-of-nine-marijuana-in

(eight additional states liberalized their marijuana laws in the most recent elections).

B. The Questions of Federal Law Presented By This Case Are Important Because of the Size and Scope of the Potential Gambling Market Affected by PASPA

The constitutionality and reach of PASPA also raises significant practical concerns. It affects numerous types of sports gambling, deprives states of tax revenue, and increases the size of the black market for sports gambling.

Since PASPA was enacted, interest in sports gambling has increased. Most recently, there has been a growing market for fantasy sports, including daily fantasy sports leagues that award substantial prizes or cash winnings. *See* Steven Titch & Michelle Minton, *Game Changer: Rethinking Online Gambling Regulation in the Age of Daily Fantasy Sports*, Comp. Enter. Inst. Issue Analysis (May 2016).[5] Since this market began in 2006, daily fantasy sports has generated approximately $3 billion in entry fees, from nearly 41 million players in the United States and Canada. *See id.* at 1. Although nonexistent when PASPA was enacted, this fantasy gaming may be subject to the statute's restrictions. *See* Daniel Wallach, *No Question, PASPA Applies to Daily Fantasy Sports*, Sports Law Blog (Jan. 11, 2016);[6] Andy Moore, *Does State Regulation of Fantasy Sports Violate*

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[5] https://cei.org/sites/default/files/Steven%20Titch%20and%2Michelle%20Minton%20-%20Game%20Changer.pdf

[6] http://sports-law.blogspot.com/2016/01/no-question-paspa-applies-to-daily.html

PASPA?, Law360.com (Dec. 8, 2015).[7] If so, states may be hamstrung in their ability to regulate it effectively. If a state imposes some regulations on daily fantasy sports, will it run afoul of PASPA by impliedly "authorizing" the activity that's allowed? According to the Massachusetts Gaming Commission, regulation of this new market is necessary to protect the interests of participants and provide predictability to participating companies. Massachusetts Gaming Commission, *White Paper on Daily Fantasy Sports* 18-20 (Jan. 11, 2016).[8] However, PASPA, which the white paper describes as "a peculiar and vague federal statute," leaves states unsure what, if anything, they can do to protect their residents. *Id.* at 15-16.

The decision below impacts states' tax revenues and ability to address the black market for sports gambling. These are precisely the concerns that led New Jersey to reform its own laws. While legally placed bets were approximately $232 million in 2015, the illegal sports gambling market is much larger. *See* Jonathan Stempel, *New Jersey sports betting law struck down by U.S. appeals court*, Reuters.com (Aug. 9, 2016)[9] ($232 million in legally placed bets); American Gaming Association, Press Release, *Americans to Bet $4.2 Billion on Super Bowl 50*

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[7] http://www.law360.com/articles/734823/does-state-regulation-of-fantasy-sports-violate-paspa

[8] http://massgaming.com/wp-content/uploads/MGC-White-Paper-on-Daily-Fantasy-Sports-1-11-16.pdf

[9] http://www.reuters.com/article/us-usa-gambling-new-jersey-idUSKCN10K1FF

(Jan. 27, 2016)[10] (nearly 97% of sports bets, worth more than $100 billion, are wagered illegally); National Gambling Impact Study Commission, *Final Report* (June 1999)[11] (sports gambling is the most widespread and popular form of gambling, with an illegal market ranging from $80 billion to $380 billion annually). By pushing this market underground, PASPA undermines states' ability to tax it.

The size of this illegal market also makes it more difficult for states to investigate and prosecute truly bad actors. *See* Dr. David Forrest & Rick Parry, *The Key to Sports Integrity in the United States: Legalized, Regulated Sports Betting* (Sept. 27, 2016).[12] By denying states needed flexibility to address these impacts to their residents and economies, the Third Circuit's decision complicates efforts to combat abusive activities.

These practical impacts are not limited to New Jersey, but will affect states and their economies nationwide. As the leaders of several of the plaintiffs in this case have candidly acknowledged, the popularity of sports gambling and fantasy sports make it a question of when, not if, other states will follow New Jersey's lead. *See, e.g.*, David Purdum, *Adam Silver: Betting is 'inevitable'*, ESPN.com (Sept. 5,

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[10] https://www.americangaming.org/newsroom/press-releasess/americans-bet-42-billion-super-bowl-50

[11] https://babel.hathitrust.org/cgi/pt?id=pur1.32754071462216;view=1up;seq=34

[12] https://www.americangaming.org/sites/default/files/FINAL%20SPORTS%20INTEGRITY%20REPORT.pdf

2014)[13] (quoting NBA Commissioner Adam Silver as predicting "[i]t's inevitable that . . . there will be legalized sports betting in more states than Nevada").

CONCLUSION

The judge's role has famously been analogized to an umpire calling balls and strikes. In this case, the Court is being asked to define the strike zone against which federal laws that appear to commandeer states will be judged. This question is of immense doctrinal and practical importance. The boundary must be clearly defined if the anti-commandeering doctrine is going to continue to protect federalism and individual liberty. While it took the Cubs 108 years to win another World Series, this Court need not wait that long to clarify this important doctrinal area. The petition for certiorari should be granted so that this Court can resolve the issue and provide needed guidance to states and the lower courts.

DATED: November, 2016.

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[13] http://www.espn.com/espn/betting/story/_/id/11466692/nba-commissioner-adam-silver-says-sports-betting-inevitable

RECORD AND BRIEFS.

Nos. 16-476, -477

Supreme Court, U.S.
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In the Supreme Court of the United States

CHRISTOPHER J. CHRISTIE, GOVERNOR OF NEW JERSEY, ET AL.,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Respondents.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF PROFESSOR RYAN M. RODENBERG AS *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*[1]

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SUMMARY OF ARGUMENT

The Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3701 *et seq.* ("PASPA") unconstitutionally delegates regulatory power to sports leagues in violation of the private nondelegation doctrine. PASPA also violates Article III's "cases" or "controversies" requirement by allowing injunctive relief to non-litigant third parties.

Prior to its enactment, the Department of Justice ("DOJ") opposed PASPA on two grounds. Letter from W. Lee Rawls, Assistant Attorney General, Department of Justice, to the Honorable Joseph R. Biden, Jr., Chairman, Committee on the Judiciary (Sept. 24, 1991). First, the DOJ concluded that PASPA raised

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[1] Pursuant to Rule 37, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Counsel for all parties were timely notified more than ten days before the filing of this brief. Letters from the parties consenting to the filing of the *amicus curiae* brief have been filed with the Clerk of the Court.

"federalism issues." *Id.* Second, the DOJ found it "particularly troubling that [PASPA] would permit enforcement of its provisions by sports leagues." *Id.* Petitioners comprehensively address the DOJ's first concern in their petitions for a writ of certiorari. *Amicus curiae* addresses the DOJ's second concern here.

PASPA violates well-established constitutional limits regarding the legislative delegation of regulatory power as set forth in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. ___, 135 S. Ct. 1225 (2015). The Court has made clear that Congress cannot delegate regulatory authority to a private entity. This exact issue was raised in a related context nine years ago by the same five plaintiff sports leagues in this case. The private plaintiffs here – the National Collegiate Athletic Association ("NCAA"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"), and Office of the Commissioner of Baseball ("MLB") (collectively "Plaintiff Sports Leagues") – cautioned Congress that a draft bill aimed at relaxing internet gambling restrictions with an opt-out clause for sports betting could "be challenged in U.S. courts on the grounds that Congress has unconstitutionally delegated its lawmaking power (to ban Internet gambling) to private parties (commissioners of various sports leagues and conferences)." Letter from Rick Buchanan (NBA), Elsa Kircher Cole (NCAA), William Daly (NHL), Tom Ostertag (MLB) & Jeffrey Pash (NFL) to Members of the House Financial Services Committee (May 31, 2007). Similarly, PASPA's outsourcing of regulatory authority to sports leagues runs counter to the private

nondelegation doctrine. In sum, Congress has given private sports leagues a substantial – and unconstitutional – role in deciding what types of sports gambling are lawful.

PASPA, as interpreted by lower courts, also unconstitutionally allows injunctive relief to non-litigant third parties in contravention of Article's III's "cases" or "controversies" requirement. The District Court's self-reversal on this point in connection with New Jersey's challenged sports betting law renders PASPA inconsistent with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) and other Court precedent regarding standing, especially within the narrow context of an injunction. In this case, the District Court initially granted injunctive relief to the Plaintiff Sports Leagues in a manner "limited to the application that's been put before the [c]ourt which is limited to the plaintiffs' games." Order on Plaintiffs' Application for a Temporary Restraining Order, *NCAA et al. v. Christie et al.* No. 3:14-cv-14-6450 (MAS) (LHG) (Oct. 24, 2014). But hours later, with no citation to authority and no supplemental briefing, the District Court reversed itself and ruled, in relevant part: "The scope of restraints is NOT limited to the games sponsored by the plaintiffs' leagues" (emphasis in original). *Id.* This *sua sponte* change extended PASPA-derived injunctive relief to *all* sports leagues, not just the leagues represented in the action before the court. Such extensions are unconstitutional.

Deciding whether PASPA is constitutionally valid on the grounds discussed by *amicus curiae* provides the Court with two alternative legal bases to decide this

case. These alternatives differ markedly from the arguments set forth by the Petitioners.

For these reasons, the Court should grant the petitions for writ of certiorari.

ARGUMENT

I. The Professional and Amateur Sports Protection Act Unconstitutionally Delegates Regulatory Power to Sports Leagues in Violation of the Private Nondelegation Doctrine

Prior to PASPA's enactment, the DOJ told Congress that it was "particularly troubling that [PASPA] would permit enforcement of its provisions by sports leagues." Letter from W. Lee Rawls, Assistant Attorney General, Department of Justice, to the Honorable Joseph R. Biden, Jr., Chairman, Committee on the Judiciary (Sept. 24, 1991). In 2007, the Plaintiff Sports Leagues communicated a related concern to Congress, expressing reservations about private parties' role in banning gambling. The year after the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA") was enacted, Congress considered a House bill (H.R. 2046) that would roll back some of UIGEA's restrictive internet gambling provisions. 31 U.S.C. § 5361 *et seq.*

Included in the draft bill was an opt-out clause permitting sports leagues to prohibit internet gambling on affiliated sporting events. The NFL, MLB, NBA, NHL, and NCAA – the same five plaintiffs here – sent a May 31, 2007 letter to Congress in opposition to H.R. 2046 generally and the opt-out provision specifically. In relevant part, the Plaintiff Sports Leagues wrote:

> "[T]he opt-outs are subject to challenge in U.S. courts on the grounds that Congress has unconstitutionally delegated its lawmaking power (to ban Internet gambling) to private parties (commissioners of various sports leagues and conferences)." Letter from Rick Buchanan (NBA), Elsa Kircher Cole (NCAA), William Daly (NHL), Tom Ostertag (MLB) & Jeffrey Pash (NFL) to Members of the House Financial Services Committee (May 31, 2007).

The apparent rationale of the Plaintiff Sports Leagues in their May 31, 2007 letter to Congress is the same rationale underpinning *amicus curiae's* brief – through PASPA, Congress has unconstitutionally delegated its legislative power over sports gambling to private sports leagues.[2] Via the deputizing provisions of PASPA, Congress has effectively delegated the authority to shape the contours of federal sports gambling policy to private actors (sports leagues), with PASPA-deputized sports leagues left to choose whether to regulate or not according to their own interests.[3]

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[2] Senator Bill Bradley explained how PASPA is tethered to Congressional lawmaking efforts: "To aid in the enforcement of this legislative goal of proscribing sports betting, [PASPA] authorizes parties such as the [DOJ] and any affected sports organization to seek injunctive relief against an infringement of the act." Bill Bradley, *The Professional and Amateur Sports Protection Act - Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. OF SPORT L. 5, 9 (1992).

[3] Congressional testimony from Oregon State Lottery director James J. Davey described PASPA's delegation as follows: "While it is true the federal government has regulated interstate wagering, the federal government has not attempted to tell the

The grant of opt-in regulatory power under PASPA is functionally analogous to the proposed opt-out clause the Plaintiff Sports Leagues argued against in their joint 2007 letter to Congress. PASPA's conferral of broad sports gambling regulatory power to private sports leagues is also in direct conflict with Congress' finding that: "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. § 3001(a)(1).[4] Under PASPA, sports leagues have priority over States in this regard.

Others have expressed concerns closely tied to those of the DOJ and Plaintiff Sports Leagues. According to

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states what they can do within their own borders. This legislation would do precisely that. Moreover, it would delegate to private parties, the professional sports leagues, the power to enforce these restrictions against the sovereign states. If Congress can enact this legislation, what is to stop it from prohibiting state lotteries altogether in favor of a national lottery, or of authorizing other private parties to enforce their 'special interests' against the states." Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcommittee on Economic and Commercial Law of the House of Representatives Committee on the Judiciary, 102d Congress (Sept. 12, 1991). Congressional testimony from Massachusetts State Lottery director Thomas O'Heir was in accord: "[PASPA] would delegate to private parties the power to enforce...restrictions against the States." *Id.*

[4] This finding is consistent with a prior statement made by executives from the Plaintiff Sports Leagues: "whether you think gambling liberalization is a bad idea or a good one, the policy judgments of State legislatures and Congress must be respected." Letter from Rick Buchanan (NBA), Elsa Kircher Cole (NCAA), William Daly (NHL), Tom Ostertag (MLB) & Jeffrey Pash (NFL) to Members of Congress (July 30, 2007).

Senator Chuck Grassley: "[PASPA] would prohibit purely intrastate activities. The Federal Government also has never authorized private parties to enforce such restrictions against the States. This legislation would do so." S. Rep. 102-248, *Professional and Amateur Sports Protection*, Nov. 26, 1991, p. 12. Two commentators concurred: "PASPA is vulnerable to constitutional challenges based on its procedural mechanisms...PASPA is a facially unprecedented law, giving sports organizations the ability to trump state legislators." I. Nelson Rose and Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45(2) CONN. L. REV. 653, 687 (2012).

The purported purpose of PASPA was "to prohibit sports gambling conducted by, or authorized under the law of, any State or other governmental entity." S. Rep. 102-248, *Professional and Amateur Sports Protection*, Nov. 26, 1991, p. 3. PASPA also aimed to "keep sports gambling from spreading." *Id.* Through the empowerment of certain sports leagues and the inclusion of a number of exemptions, Congress left PASPA's reach to be determined, at least in part, by sports league executives. As a result, some forms of sports gambling covered by PASPA have been challenged, while other types have been ignored. Congress could have opted for a uniform federal ban on sports gambling and sought to preempt any conflicting state law. Congress could have also left PASPA enforcement exclusively to the DOJ. But Congress selected neither option, pushing PASPA into unconstitutional grounds vis-à-vis the private nondelegation doctrine.

Article I states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I, § 1. The resulting nondelegation doctrine includes two prongs: (i) the public nondelegation doctrine and (ii) the private nondelegation doctrine. Under the public nondelegation doctrine, "Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("delegations of rulemaking authority conveyed to an agent under the limits of an intelligible principle are allowed; those without the limits of an intelligible principle are prohibited").

The Court has largely allowed Congress to delegate rulemaking power to other government actors. However, since *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), the Court has made clear that delegation of regulatory power to private, non-governmental entities is prohibited as "denial of rights safeguarded by the due process clause of the Fifth Amendment." In *Carter Coal*, the Court explained that a delegation to a private party "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interest may be and often are adverse to the interests of others in the same business." *Id.*; *see also*, *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (challenged statute was permissible because it did not "delegate regulatory power to private individuals"). The only exception to this rule is if the private entities "function subordinately" to the

government. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940).

The Court recently revisited this issue in *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. , 135 S. Ct. 1225 (2015). There, the Court reversed a decision finding a violation of the private nondelegation doctrine on the basis that the regulator in question, Amtrak, was a government actor, not a private party. In so doing, the Court reaffirmed the nondelegation doctrine as applied to private parties. *Id.* at 1252 ("the 'private nondelegation doctrine' is merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private") (Justice Thomas concurring). Relatedly, when delegating to private parties, "there is not even a fig leaf of constitutional justification." *Id.* at 1237 (Justice Alito concurring). Further, "[p]rivate entities are not vested with 'legislative Powers. Nor are they vested with the executive Power,' which belongs to the President." *Id.* (internal citations omitted). And, "[b]y any measure, handing off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'" *Id.* at 1238, quoting *Carter Coal*, 298 U.S. at 311.

The rationale underpinning the private nondelegation doctrine relates to the Appointments Clause barring private actors from exercising "significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Through PASPA, private sports leagues are empowered to file suit against States and individuals. Such power is significant, as it carries with it the ability to shape sports gambling laws nationwide. The

Plaintiff Sports Leagues have sued under PASPA three times – once against Delaware Governor Markell and twice against New Jersey Governor Christie. In sum, PASPA gives sports leagues a substantial role in determining what types of sports betting are either legal or illegal. For these reasons, PASPA is unconstitutional vis-à-vis the private nondelegation doctrine.

The lessons of *Carter Coal* and *Ass'n of Am. R.R.* are directly applicable to the sports gambling context. Through PASPA, Congress has delegated regulatory power to private sports leagues on par with that of the DOJ. Since enactment, only deputized sports leagues have initiated PASPA lawsuits. The regulatory equality between the DOJ and private sports leagues under PASPA differs markedly from the subservient role permitted under *Adkins*. With many sports leagues opting to monetize sports gambling through the sale of gambling-related data (including no fewer than two of the Plaintiff Sports Leagues), such leagues can reasonably be viewed as actual or potential competitors to States like New Jersey.

Plaintiff Sports Leagues, like other sports associations, are private actors for purposes of the private nondelegation doctrine. However, if private sports leagues were somehow found to be a governmental entity, PASPA's lack of an "intelligible principle" would still render the statute unconstitutional under the public nondelegation doctrine in *Whitman* and *J.W. Hampton*. There are three reasons for this.

First, with at least two of the five Plaintiff Sports Leagues actively monetizing sports gambling, the

Plaintiff Sports Leagues' interests are adverse to the very entities PASPA's regulatory scheme attaches – New Jersey and other States seeking to regulate and tax sports betting under state law. With today's technology-fueled revenue-generating gambling opportunities for sports leagues, New Jersey and the Plaintiff Sports Leagues are actual or potential competitors. Indeed, the Plaintiff Sports Leagues posited that they have a proprietary interest in "the degree to which others derive economic benefits from their own games." Response Brief of Plaintiffs-Appellees at 18, *NCAA et al. v. Christie et al.*, (June 7, 2013) No. 13-1713, 13-1714, 13-1715. The Plaintiff Sports Leagues also contended that they "have an essential interest in how their games are perceived and the degree to which their sporting events become betting events" (emphasis removed). *Id.* at 13-14.

Second, PASPA included a grandfathering clause that exempted certain States and betting activities from Section 3702's coverage.[5] Revealingly, PASPA's Senate Report was unable to precisely delineate the exact number or identities of the exempt States: "It appears that Nevada, Oregon, Delaware, and possibly a few other states would be exempt from the ban." S. Rep. 102-248, *Professional and Amateur Sports*

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[5] Under PASPA, in relevant part, it is unlawful for state governments to: "sponsor, operate, advertise, promote, license, or authorize...[a] betting, gambling, or wagering scheme based...on one or more competitive games in which amateur or professional athletes participate...or on one or more performances of such athletes in such games." 28 U.S.C. § 3702.

Protection, Nov. 26, 1991, p. 11.[6] Senator Dennis DeConcini, the chair of the subcommittee holding a PASPA hearing, stated that he supported exemptions for Nevada, Delaware, Montana, Oregon, and South Dakota. Prohibiting State-Sanctioned Sports Gambling: Hearing on S. 473 and S. 474 Before the Subcommittee on Patents, Copyrights & Trademarks of the Senate Committee on the Judiciary, 102d Congress (June 23, 1991). Congress' uncertainty regarding PASPA's scope runs counter to the public nondelegation doctrine's "intelligible principle" requirement. With Congress unaware of PASPA's scope and the DOJ's inaction to date, the regulation of sports wagering nationwide has effectively been left to sports leagues.

Third, Justice Stevens – writing for a unanimous Court in a 1999 decision about the permissibility of certain gambling-related advertising – opined that PASPA "includes a variety of exemptions, some with obscured Congressional purposes." *Greater New Orleans Broadcasting Ass'n, Inc. et al. v. United States*, 527 U.S. 173, 179 (1999). Justice Stevens posited that the exemptions make the scope of PASPA's § 3702 "somewhat unclear." *Id.* at 180. Justice Stevens's observations evidence the lack of any "intelligible principle" in PASPA. Unsurprisingly, the regulation of

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[6] Two commentators posited that: "PASPA grandfathers-in sports betting policies in Nevada, Delaware, and almost a dozen other states, while prohibiting states from later legalizing sports betting or expanding the grandfathered operations." I. Nelson Rose and Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45(2) CONN. L. REV. 653, 686 (2012).

sports betting under PASPA has been uneven and selective.

A review of PASPA enforcement actions is illustrative. Congress concluded PASPA's exemptions reflect a "policy judgment that sports gambling should be strictly contained." S. Rep. 102-248, *Professional and Amateur Sports Protection*, Nov. 26, 1991, p. 10. Since PASPA's enactment in 1992, sports gambling has not been strictly contained. To date, the DOJ has never initiated a PASPA proceeding against a State or individual in the statute's 24-year history. By contrast, the Plaintiff Sports Leagues have initiated three PASPA lawsuits.

The direction of PASPA's regulatory scheme is also illustrated by the potential PASPA lawsuits that have *not* been pursued. Other than a 2009 case against Delaware, the DOJ, Plaintiff Sports Leagues, and any number of other sports leagues have opted against filing PASPA lawsuits against grandfathered States now offering sports betting schemes that did not exist at the time of PASPA's enactment. Examples include Nevada and Montana. Likewise, there have not been any PASPA cases filed in connection with recently-enacted fantasy sports laws in Indiana, Mississippi, Virginia, Tennessee, Massachusetts, New York, Missouri, and Colorado involving contests predicated "on one or more performances of...athletes in...games." 28 U.S.C. § 3702.

The Senate Report accompanying PASPA also made clear that its parameters do not depend on relative levels of skill or chance, which States often use as a distinguishing factor in defining gambling: "The prohibition of section 3702 applies regardless of

whether the scheme is based on chance or skill, or on a combination thereof." S. Rep. 102-248, *Professional and Amateur Sports Protection*, Nov. 26, 1991, p. 9. As such, skill-chance considerations should seemingly play no role in PASPA regulatory efforts.

Varied levels of PASPA enforcement have resulted. While the five Plaintiff Sports Leagues were strong supporters of PASPA immediately prior to its enactment, one or more of them may now be experiencing buyer's remorse. Shifting stances on the morality of sports gambling have played a role in PASPA's uneven enforcement. More importantly, some sports leagues are increasingly viewing the massive sports gambling market as an untapped revenue source.[7] For example, a majority of the Plaintiff Sports Leagues own equity stakes in consumer engagement-enhancing fantasy sports companies. Further, at least two of the Plaintiff Sports Leagues use a third party to sell betting-relevant real-time data to sports gambling operators overseas.

But PASPA, in an ironic twist, may now be a constraint to entrepreneurial sports leagues in this regard. Far from "protecting" sports as PASPA's title implies, PASPA may be inhibiting both game integrity

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[7] Indeed, a commentator posited: "Instead of the public's passion for competitive sports driving a complimentary market in sports betting, the gambling industry may create a paying audience for professional sports. This dynamic is most clearly seen in the rise of 'Fantasy Sports' leagues and the corresponding increased demand for television sports programming." Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B. U. L. Rev. 371, 390 (2006).

and pecuniary aspects of legal and regulated gambling that *benefit* sports leagues. The Senate Report accompanying PASPA explained:

> The committee would like to make it clear that this bill does not benefit professional sports financially. It does not reserve the right to the leagues to hold their own sports gambling operations. They are clearly prohibited under this bill from instituting their own sports betting scheme. S. Rep. 102-248, *Professional and Amateur Sports Protection*, Nov. 26, 1991, p. 8.

As such, PASPA can plausibly be viewed as a barrier to a sports league's potential monetization of sports betting domestically. This implication has, in turn, likely contributed to varied levels of PASPA regulatory efforts by sports leagues. All of these concerns derive from Congress' unconstitutional grant of lawmaking power (to regulate sports gambling) to private sports leagues. This results because PASPA allows certain sports leagues to unilaterally opt-in to a regulatory role. When Congress outsourced its lawmaking authority over the permissible scope of state-sponsored sports wagering beyond government actors like the DOJ, the private nondelegation doctrine was violated.

Revealingly, the Plaintiff Sports Leagues pinpointed the private nondelegation doctrine in a 2007 letter to Congress within the context of banning internet gambling. The opt-out clause in the draft bill that the Plaintiff Sports Leagues opposed in 2007 is functionally akin to the opt-in provision in PASPA whereby sports leagues are permitted to regulate the prevalence of permissible sports gambling in grandfathered and non-

grandfathered States and seek injunctive relief against States or individuals. The Plaintiff Sports Leagues cautioned against the unconstitutional delegation of Congressional lawmaking power to private parties in 2007 and *amicus curiae* cautions against the delegation of regulatory power under PASPA now.

II. The Professional and Amateur Sports Protection Act's Grant of Injunctive Relief to Non-Litigant Third Parties is Unconstitutional Under Article III's "Cases" or "Controversies" Requirement

The lower courts have extended the scope of PASPA's injunctive relief beyond what is constitutionally permitted under Article III. Potential PASPA plaintiffs fall into two categories: (i) the DOJ or (ii) private sector sports organizations. PASPA's enforcement provision reads as follows:

> A civil action to enjoin a violation of Section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation." 28 U.S.C. § 3703.

This sub-section of PASPA is straightforward. PASPA is a civil, not criminal, statute. The sole remedy under PASPA is injunctive relief. Only the DOJ or certain sports leagues are entitled to pursue equitable remedies under PASPA. According to the Senate's post-hearing report:

> Section 3703 authorizes the U.S. Attorney General, or an amateur or professional sports organization whose games are alleged to be the basis of a violation of Section 3702, to seek an injunction against such violation in the appropriate Federal District Court. S. Rep. 102-248, *Professional and Amateur Sports Protection*, Nov. 26, 1991, p. 9.

The DOJ is not a plaintiff in this litigation, only the five Plaintiff Sports Leagues are. For the Plaintiff Sports Leagues to sustain the lawsuit generally, they had to comply with Article III and related standing requirements. To do so, the Plaintiff Sports Leagues consistently sought injunctive relief solely on their own behalf. For example, in seeking to seal select documents from the public domain, each individual plaintiff posited that such sealing was necessary to keep certain privileged and sensitive documents from the view of other plaintiffs and third parties, evidencing the individual nature of each sports league's claims. Other examples from the Plaintiff Sports Leagues' briefs are illustrative:

> The games on which New Jersey intends to authorize gambling belong to the [Plaintiff Sports Leagues]. They are plaintiffs' games, and defendants do not – indeed, cannot – claim otherwise. Plaintiffs' Reply Brief in Support of Their Motion for Summary Judgment and..., *NCAA et al. v. Christie et al.* No. 3:12-cv-4947 (MAS) (LHG) (Dec. 12, 2012).

> In PASPA, Congress did not grant a cause of action to remedy some undifferentiated public interest, but granted a right of action only to

> those whose discernable interests PASPA was enacted to protect – professional and amateur sports organizations whose own games are the object of a challenged violation. *Id.*
>
> Plaintiffs have an obvious, undisputed and particularized interest in how their own games will be presented to the public and their fans, including with respect to whether those games will be the basis for state-sponsored sports wagering. Congress agreed, concluding that the spread of state-sponsored sports gambling threatens to harm the integrity of plaintiffs' games. *Id.*

At no time did any of the Plaintiff Sports Leagues claim they were entitled to injunctive relief beyond the alleged harm each suffered individually. And for good reason. Standing was a threshold issue in the first iteration of this case. The Plaintiff Sports Leagues were granted standing to sue New Jersey in connection with the state's new sports betting law. Sports leagues other than the plaintiff quintet could have filed suit too, but they opted not to. Their absence is dispositive.

The very title of PASPA – "Professional and Amateur Sports Protection Act" – illustrates why. The statute extends "protection" to sports leagues who may feel individually aggrieved by state-authorized sports wagering not otherwise exempted under PASPA. The Plaintiff Sports Leagues described PASPA this way:

> [A]s its very title confirms, PASPA was enacted to protect *professional and amateur sports organizations* and to grant such organizations a legally protected interest in operating their own

> sporting events free of the spread of state-sponsored gambling. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint, *NCAA et al. v. Christie et al.* No. 3:12-cv-4947 (MAS) (LHG) (Oct. 1, 2012), p. 2. (emphasis in original).

This is particularly important, as substantial evidence exists about how sports leagues benefit from legal and regulated sports wagering in the form of enhanced game integrity and certain pecuniary aspects. Indeed, the top executive of one of the Plaintiff Sports Leagues penned a *New York Times* op-ed in 2014 and argued in favor of a legal and regulated sports wagering framework, including "mandatory monitoring and reporting of unusual betting-line movements." Adam Silver, "Legalize Sports Betting," *New York Times* (Nov. 14, 2014).[8] Another executive from one of the Plaintiff Sports Leagues said: "The NFL is in a revenue-generating business. If the NFL believes that sports gambling would allow it to increase its revenue, the NFL would engage in that activity." Lawrence P. Ferazani 30(b)(6) Deposition, *NCAA et al.*

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[8] The integrity-enhancing monitoring of betting data for nefarious statistical fingerprints in a legal and regulated sports gambling market has only recently drawn the attention of the Plaintiff Sports Leagues. For example, three years before one of the Plaintiff Sports Leagues retained a third party to perform such monitoring services, its executive said: "We think the idea that any sportsbook can be helpful to us, again, is completely incorrect. It's almost like saying we'll create a problem and then we'll tell you about it. And how does that benefit us?" Thomas Ostertag 30(b)(6) Deposition, *NCAA et al. v. Christie et al.* No. 3:12-cv-4947 (MAS) (LHG) (Nov. 6, 2012).

v. Christie et al. No. 3:12-cv-4947 (MAS) (LHG) (Nov. 5, 2012).

Uninvolved sports leagues should not – indeed, cannot – be subject to any injunction based on Plaintiff Sports Leagues' alleged individualized harms.[9] The Plaintiff Sports Leagues obtained injunctive relief under PASPA for their own "protection," not for others. Nevertheless, the District Court granted a blanket injunction against New Jersey's offering of sports betting tethered to all sporting events, even those unrelated to the Plaintiff Sports Leagues. This expanded PASPA's scope beyond what is permissible under Article III.

The precise moment when PASPA slipped into unconstitutional grounds on this issue is easily pinpointed in this case. On October 24, 2014, the District Court granted Plaintiff Sports Leagues' motion for a temporary restraining order. Order on Plaintiffs' Application for a Temporary Restraining Order, *NCAA et al. v. Christie et al.* No. 3:14-cv-14-6450 (MAS) (LHG) (Oct. 24, 2014). The District Court judge issued his order from the bench, with the litigants' attorneys taking part via teleconference. At the conclusion of the oral ruling, the official transcript included the following exchange, in relevant part:

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[9] A partial list of U.S.-based sports leagues that opted not to pursue PASPA claims against New Jersey include: (i) Major League Soccer; (ii) National Women's Soccer League; (iii) WTA Tour; (iv) ATP World Tour; (v) Women's National Basketball Association; (vi) LPGA Tour; (vii) PGA Tour; (viii) Ultimate Fighting Championships; (ix) NASCAR; (x) United States Olympic Committee; (xi) World Boxing Organization; and (xii) Arena Football League.

THE COURT: Can you hear me?
MR. RICCIO: Yes, I can hear you now. I was unclear whether the scope of your injunction is limited to the plaintiffs' games and not other sporting contests that the plaintiffs have no interest in.
THE COURT: Well, right now the only – the scope is limited to the application that's been put before the Court which is limited to the plaintiffs' games.
MR. RICCIO: That was the clarification I was seeking. Thank you, your Honor.
THE COURT: That's all we have for today counsel. *Id.*

Hours after the District Court's ruling regarding the permissible scope of injunctive relief under PASPA, and with no citations to authority or supplemental briefing, the District Court proceeded to reverse itself on this point and added the following at the end of its order:

ADDENDUM: Upon further consideration of the question posed by [Mr. Riccio] as to the scope of the temporary restraining order, this court finds that the temporary restraining order restrains the implementing, enforcing, or taking any action pursuant to New Jersey Senate Bill 2460 (P.L. 2015, c. 62), the 2014 Law, and would apply to any lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly, on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in

> such games. The scope of restraints is NOT limited to the games sponsored by the plaintiffs' leagues (emphasis in original). *Id.*

The District Court's *sua sponte* reversal is unconstitutional under Article III, as deciding an issue that the plaintiffs did not raise is barred. Situations like this are tailor-made for analysis under Article III's "cases" or "controversies" requirement. To do otherwise would invite absurd results where a litigant can further claims properly belonging to third parties with no nexus to the litigation. Indeed, the Plaintiff Sports Leagues made this exact point in an earlier legal filing: "If New Jersey had singled out the World Series, for state-sponsored gambling, then only Major League Baseball could sue." Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint, *NCAA et al. v. Christie et al.* No. 3:12-cv-4947 (MAS) (LHG) (Oct. 1, 2012), p. 15. The Plaintiff Sports Leagues' baseball example is well-reasoned, as it correctly explains why only actual litigants should be permitted to obtain injunctive relief specific to their own particularized injury alleged under PASPA.

Constitutional and prudential standing requirements were enunciated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Constitutional standing derives from Article III's "cases" or "controversies" provision. U.S. Const. Art. III, § 2, cl. 1. Article III standing is established via a three-pronged test: (i) "injury in fact," (ii) "causation," and (iii) "redressability." *Lujan*, 504 U.S. at 560-61. The plaintiff's injury must be "based in reality." *Doe v. Nat'l Bd. of Medical Examiners*, 199 F.3d 146, 153 (3d Cir. 1999).

Prudential standing includes self-imposed jurisdictional limits, including "the general prohibition on a litigant raising another person's legal rights." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Relatedly, the plaintiff's injury cannot result from "the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. The Court found a narrow exception for third-party standing, but only if the plaintiff and third party have a close relationship and some obstacle prevents the third party from pursuing its own claims. *Kowalski v. Tesmer*, 543 U.S. 125, 129-130 (2004). Neither *Kowalski* prong is met here, as the Plaintiff Sports Leagues do not share any close relationship with rival leagues and there are no meaningful obstacles preventing non-litigant sports leagues from asserting their own PASPA claims.

The District Court's broad grant of injunctive relief to non-litigant third parties is particularly troubling given that it occurred within the context of a motion for a temporary restraining order. Injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The Plaintiff Sports Leagues never claimed that they would be harmed if an operator in New Jersey were to offer state law-compliant intrastate sports wagering on tennis, golf, race car driving, mixed martial arts, or any other sporting event unrelated to the narrow categories of sports associated with the five Plaintiff Sports Leagues.

If the lower courts' ruling is left to stand, the impact would be profound. Future PASPA sports league plaintiffs would seemingly be permitted to obtain

sweeping injunctions against States. And non-litigant third party sports leagues could be negatively impacted by such blanket injunctions without even being part of the case. Further, sports leagues pursuing beneficial game integrity and pecuniary aspects associated with a lawful sports gambling framework could be prevented from doing so. This would, in turn, lead to "reverse PASPA" lawsuits challenging broad injunctions obtained by an unrelated sports league under PASPA. With several sports leagues – including some of the Plaintiff Sports Leagues – moving to monetize sports betting more aggressively than others, dueling PASPA-derived lawsuits are inevitable. More broadly, the underlying decision disrupts well-settled principles of justiciability in the federal courts and could be cited as precedent for non-litigant third parties' ability to obtain injunctive relief under certain federal laws similar to PASPA. Finally, given PASPA's regulatory scheme, other States left with a Hobson's choice may follow New Jersey's lead and move to repeal their current sports gambling prohibitions in whole or in part.

CONCLUSION

This case is about Congress' ability to bestow sports gambling-related regulatory power under PASPA, not merely whether New Jersey law can be partially repealed to permit sports betting in certain venues. What *amicus curiae* presents here is an alternative to Petitioners' arguments. *Amicus curiae* is focused on (i) Congress' unconstitutional delegation of regulatory power to sports leagues (to determine what types of sports gambling are permissible under PASPA) in violation of the private nondelegation doctrine and

(ii) the District Court's unconstitutional grant of PASPA injunctive relief to non-litigant third parties in contravention of Article III's "cases" or "controversies" requirement.

The Court should grant the petitions for writ of certiorari.

Respectfully submitted,

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RECORD AND BRIEFS.

Nos. 16-476, -477

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In the Supreme Court of the United States

CHRISTOPHER J. CHRISTIE, GOVERNOR OF NEW JERSEY, ET AL.,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Respondents.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF PROFESSOR RYAN M. RODENBERG AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*[1]

Ryan M. Rodenberg works as an associate professor at Florida State University with a research focus on forensic sports law analytics. He has published a number of academic and non-academic articles about sports gambling and has testified before Congress regarding the same. He has a strong interest in ensuring that the nation's sports gambling laws comply with the Constitution and are correctly interpreted.

SUMMARY OF ARGUMENT

This is the wrong case—with the wrong plaintiffs—to address whether a federal statute that prohibits modification or repeal of state prohibitions on private sports gambling conduct impermissibly commandeers the regulatory power of States in contravention of *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997).

Governor Christie, various New Jersey state officials, and the New Jersey Thoroughbred Horsemen's Association (collectively "Petitioners") can comply with the sports betting ban in the Professional

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[1] Pursuant to Rule 37, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Florida State University is not a signatory to this brief and the views expressed herein are solely those of *amicus curiae*. Counsel for all parties were timely notified more than ten days before the filing of this brief. Written communication from the parties consenting to the filing of the *amicus curiae* brief have been filed with the Clerk of the Court.

and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3701 et seq. ("PASPA") by doing nothing. Indeed, Petitioners' anti-commandeering argument only arose when New Jersey opted to repeal an existing law and was sued for allegedly violating PASPA's proscription. Both *New York* and *Printz* involved affirmative obligations about what States must do pursuant to a Congressional directive. PASPA contains no such directive, only a negative requirement that New Jersey and certain other States not alter their own sports gambling laws to permit the activity. PASPA's peculiarity cautions against a conventional anti-commandeering analysis of the type offered by the litigants.

This case differs from *New York* and *Printz* in other important ways too. Unlike *New York* and *Printz*, the United States is not a party to this litigation. The Federal Government, through the Department of Justice ("DOJ"), neither initiated the lawsuit nor intervened as a litigant. Instead the plaintiffs are various private sports leagues, a quintet comprised of the National Collegiate Athletic Association ("NCAA"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"), and Office of the Commissioner of Baseball ("MLB") (collectively "Respondents"). Congress included a clause in PASPA that outsources a type of "privatized commandeering" not seen in *New York* or *Printz*.

PASPA also includes a perpetual grandfathering clause that exempts certain States from its ban, a coverage formula that departs markedly from the statutes at issue in *New York* and *Printz*. In practice,

PASPA prevents some states, but not others, from modifying or repealing their own sports gambling laws in whole or in part. Whether Congress can pass such a law is a question worthy of constitutional inquiry, but it is not the precise question addressed by the Court in either *New York* or *Printz*. Two PASPA-specific features—PASPA's offloading of regulatory authority to private entities and PASPA's unequal treatment among the States—raise constitutional issues not seen in *New York* or *Printz* and take this case outside the typical anti-commandeering context. As a result, this case gives rise to several alternative lines of analyses not brought to the Court's attention by the litigants. *Amicus curiae* provides such analysis.

The Court can resolve this case in several ways without even addressing Petitioners' anti-commandeering arguments.

At the outset, this case can be resolved through a proper textual reading of the statute, as the injunctive relief extended to Respondents exceeded what is allowed under PASPA's text. "[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam). The district court erred in granting a broad injunction against Petitioners that attached to non-litigant third parties. Recognizing the limitations of PASPA § 3703, even the Respondents argued against such an injunction prior to the district court judge's *sua sponte* reversal about the scope of the injunction against Petitioners. The court of appeals decision affirming the underlying injunction should be vacated

and remanded for further consideration as to whether Respondents have standing to assert claims on their own behalf and on behalf of others under PASPA § 3703.

Beyond this, two portions of PASPA are unconstitutional. Both parts are severable, providing the Court with an option to limit its ruling and avoid upholding or eviscerating PASPA *in toto*. Neither of these unconstitutional portions of PASPA—§ 3704(a)(1)-(2)'s exemptions for certain favored States and § 3703's delegation of regulatory power to private entities—were addressed in the petitions for writ of certiorari, but both provide the Court with sufficient grounds to decide this case.

First, PASPA's uneven ban on sports wagering and disparate treatment of the States runs afoul of the equal sovereignty doctrine as set forth in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) and *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009). PASPA discriminates among the States on two levels: (i) between favored grandfathered States and non-grandfathered States and (ii) between Nevada and other grandfathered States. PASPA's exemptions in § 3704(a)(1)-(2) fail the equal sovereignty doctrine's requirement that differential treatment between the States be "sufficiently related to the problem that it targets." *Nw. Austin* at 203. Congress enacted PASPA to address a "national problem" that "cannot be limited geographically." S. REP. 102-248 at 5, *Professional and Amateur Sports Protection* (1991). Exempting certain States from PASPA's coverage runs counter to the statute's core justification. Indeed, the Court already found PASPA's exemptions to derive from "obscured

Congressional purposes." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 179 (1999). PASPA's unconstitutional grandfather clause should be severed from the remainder of the statute.

Second, PASPA's delegation of regulatory power to private sports leagues in § 3703 is an unconstitutional deprivation of Petitioners' due process rights under the private nondelegation doctrine. PASPA violates well-established constitutional limits on the legislative delegation of regulatory power as set forth in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015). The Court has made clear that Congress cannot delegate regulatory authority to a private entity. Through PASPA, Congress has given private sports leagues a decisive role in determining what types of sports gambling are lawful among the States. The DOJ previously found it "particularly troubling that [PASPA] would permit enforcement of its provisions by sports leagues." Letter from W. Lee Rawls, Assistant Attorney General, Department of Justice, to the Honorable Joseph R. Biden, Jr., Chairman, Committee on the Judiciary (Sept. 24, 1991). The Court should sever PASPA's unconstitutional delegation of regulatory power to private entities in § 3703.

For these reasons, this case can be decided via alternative means as outlined by *amicus curiae*.

ARGUMENT

This case—commonly referred to as "*Christie II*"—is the second iteration of the litigation commenced by the five sports league plaintiffs against Petitioners in connection with New Jersey's quest to legalize sports gambling. *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, 832 F.3d 389 (3d Cir. 2016) (en banc). *Christie II* involves New Jersey's attempt to partially repeal its prohibitions on sports betting. In contrast, the "*Christie I*" case pertained to a New Jersey law that affirmatively authorized sports betting, subject to regulation by the state. *Nat'l Collegiate Athletic Ass'n, et al. v. Governor of N.J.*, et al., 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014). The Respondents prevailed in the *Christie I* case, with a divided court of appeals finding New Jersey's enabling legislation violated PASPA. With the primary litigants exactly the same in both cases, *amicus curiae* draws from both lawsuits here.

I. The District Court's Grant of Injunctive Relief to Non-Litigant Third Parties Is Contrary to the Professional and Amateur Sports Protection Act's Statutory Text

This case can be resolved statutorily. As a canon of constitutional avoidance, "it is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam); see also *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (J. Brandeis, concurring). Pointedly, "[w]hen the

validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 465-66 (1989) quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

The district court, in an order upheld by the court of appeals, issued a broad injunction preventing Petitioners from permitting intrastate gambling on all sporting events. This injunctive relief attached to sporting events wholly unrelated to Respondents. The injunction issued in this case runs counter to PASPA's text and is inconsistent with the DOJ and Respondents' position.

The district court judge initially granted injunctive relief to Respondents in a manner "limited to the application that's been put before the [c]ourt which is limited to the plaintiffs' games." Order on Plaintiffs' Application for a Temporary Restraining Order, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.* No. 3:14-cv-14-6450 (MAS) (LHG) (Oct. 24, 2014). Hours later, with no citation to authority and no supplemental briefing, the district court reversed itself and ruled, in relevant part: "The scope of restraints is NOT limited to the games sponsored by the plaintiffs' leagues" (emphasis in original). *Id.* This *sua sponte* reversal extended PASPA-derived injunctive relief to all sports leagues, even those with no nexus to this case. PASPA's statutory text does not permit such an extension. The regulatory enforcement provision in PASPA reads as follows:

> A civil action to enjoin a violation of Section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation. 28 U.S.C. § 3703.

PASPA § 3702 attaches to both governmental and private conduct and reads as follows:

> It shall be unlawful for –
> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games. 28 U.S.C. § 3702.[2]

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[2] Under PASPA, "the term 'person' has the meaning given such term in section 1 of title 1." 28 U.S.C. § 3701(4). There, "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

The DOJ is not a plaintiff in this case. The Respondents are the only plaintiffs. A straightforward reading of § 3703 clearly ties the phrase "whose competitive game" to the individual sports organization who filed suit under PASPA. The word "whose" in § 3703 functions as a possessor tethered to the individual sports organization alleging the PASPA violation. Neither PASPA's text nor PASPA's legislative history include any evidence that PASPA was intended to function as a *qui tam* statute or quasi-class action where one or more sports leagues can file suit on behalf of other non-litigant sports leagues. According to the Solicitor General, "PASPA... authorizes sports leagues to seek injunctions against violations involving *their* games" (emphasis added). Brief for the United States as Amicus Curiae at 3, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie, et al.*, Nos. 16-476 and 16-477 (May 2017). The Respondents themselves made this point clear:

> In PASPA, Congress did not grant a cause of action to remedy some undifferentiated public interest, but granted a right of action only to those whose discernable interests PASPA was enacted to protect – professional and amateur sports organizations whose own games are the object of a challenged violation. Plaintiffs' Reply Brief in Support of Their Motion for Summary Judgment and..., *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, No. 3:12-cv-4947 (MAS) (LHG) (Dec. 12, 2012).

The following verbatim transcript and order—from the hearing where the judge issued his initial order from the bench via teleconference—illustrates the

district court's error in granting a broad injunction that stretched well beyond what is allowed by PASPA's text:

> THE COURT: Can you hear me?
> MR. RICCIO: Yes, I can hear you now. I was unclear whether the scope of your injunction is limited to the plaintiffs' games and not other sporting contests that the plaintiffs have no interest in.
> THE COURT: Well, right now the only – the scope is limited to the application that's been put before the Court which is limited to the plaintiffs' games.
> MR. RICCIO: That was the clarification I was seeking. Thank you, your Honor.
> THE COURT: That's all we have for today counsel. Order on Plaintiffs' Application for a Temporary Restraining Order, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, No. 3:14-cv-14-6450 (MAS) (LHG) (Oct. 24, 2014).

Within hours, the district court reversed itself and added the following to its order:

> **ADDENDUM**: Upon further consideration of the question posed by [Mr. Riccio] as to the scope of the temporary restraining order, this court finds that the temporary restraining order restrains the implementing, enforcing, or taking any action pursuant to New Jersey Senate Bill 2460 (P.L. 2015, c. 62), the 2014 Law, and would apply to any lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly, on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on

> one or more performances of such athletes in such games. The scope of restraints is NOT limited to the games sponsored by the plaintiffs' leagues (emphasis in original). *Id.*

The district court's modified order goes beyond what PASPA's statutory text permits Respondents to seek. The Respondents emphasized this precise issue twice previously. First, Respondents wrote: "If New Jersey had singled out the World Series, for state-sponsored gambling, then only Major League Baseball could sue." Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint at 15, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, No. 3:12-cv- 4947 (MAS) (LHG) (Oct. 1, 2012). Second, during oral argument, Respondents explained:

> And PASPA actually responds to that very specifically because it gives the NFL the right to bring an action based on authorized gambling on NFL games. It gives the NBA standing to bring the challenge based on gambling on NBA games. So it's not like the NFL can bring a claim about NBA, gambling on NBA. It's very specific to their legal entitlement to protect their product. Transcript of Oral Argument at 38, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, Nos. 13-1713, 13-1714 & 13-1715, 730 F.3d 208 (3d Cir. June 26, 2013).

Uninvolved sports leagues should not—indeed, cannot—be subject to any injunction based on Respondents' alleged individualized harms. Neither should Petitioners. PASPA's statutory text does not allow it. Court precedent does not allow it either. Injunctive relief "should be no more burdensome to the

defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Likewise, there is "the general prohibition on a litigant raising another person's legal rights" *Allen v. Wright*, 468 U.S. 737, 751 (1984).

The district court issued a sweeping injunction against Petitioners that Respondents did not request. PASPA's statutory text plainly does not allow a basketball league to obtain an injunction preventing a State from permitting betting on football, baseball, hockey, tennis, golf, or mixed martial arts. Respondents should be among those most concerned about the district court's broad grant of injunctive relief to non-parties. Under the district court's interpretation of PASPA, a lone wolf sports league could obtain across-the-board injunctions in multiple States to bar types of sports-betting-related activities—such as daily fantasy sports—that the majority of the Respondents support.[3] For example, under the district

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[3] The emergence of paid daily fantasy sports illustrates a PASPA-relevant policy divide among Respondents. One of the Respondents—the NCAA—considers daily fantasy sports to be a form of sports gambling and opposes the activity. The other four Respondents distinguish daily fantasy sports from other forms of sports gambling. PASPA's sports betting ban covers "betting, gambling, or wagering scheme[s] based...on one or more competitive games in which amateur or professional athletes participate...or on one or more performances of such athletes in such games." 28 U.S.C. § 3702. Such language captures daily fantasy sports. Indeed, legislative history suggests that PASPA's general ban on sports gambling was intended to be broad: "The prohibition of [§] 3702 applies regardless of whether the scheme is based on chance or skill, or on a combination thereof. Moreover, the prohibition is intended to be broad enough to include all schemes involving an actual game or games, or an actual

court's interpretation about the availability and scope of PASPA's injunctive relief, an anti-gambling stalwart could form a basement ping pong league for the express purpose of filing PASPA lawsuits across the country, even if the underlying sports gambling alleged to be in violation of PASPA is wholly unconnected to the plaintiff.

PASPA is a sword that cuts both ways under the district court's interpretation of § 3703. This leaves a majority of the Respondents in a vulnerable position. With three of the Respondents owning equity interests in daily fantasy sports companies, certain plaintiffs in this case could become PASPA defendants in future cases under the portion of PASPA § 3702(2) that attaches to private sports-betting-related activities conducted "pursuant to the law or compact of a

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performance or performances therein." S. REP. NO. 102-248 at 9, *Professional and Amateur Sports Protection* (1991). Both PASPA's main sponsor—Senator Dennis DeConcini of Arizona—and the DOJ are on the record suggesting that fantasy sports fall under PASPA's purview too. See Ryan M. Rodenberg and John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L. J. ONLINE 1, 11 n.58 and 26 n.132 (2017). States differ markedly in how they define sports gambling, with most viewing the relative level of skill involved dispositive in determining legality. See Ryan M. Rodenberg, *Why Do States Define Gambling Differently?* ESPN.COM (Feb. 18, 2016). On this point, the Respondents have posited: "Sports gambling—particularly when it involves betting on the outcome of a single athletic contest—is an activity in which skill plays a significant role, as bettors gather and analyze information relating to the teams and sports on which they are betting and compare their own internal assessments with those generated by odds-makers." Verified Complaint at 16, *Office of the Comm'r of Baseball et al. v. Gov. Markell*, 2009 WL 2450284, No. 09-538 (D. Del. July 24, 2009).

governmental entity." 28 U.S.C. § 3702(2).[4] The lower court's expansive reading of injunctive relief available via § 3703 invites other sports leagues to sue under PASPA as a means to further their own self-interested regulatory efforts. Likewise, sports leagues who have moved past any Semmelweis reflex and are now supportive of legalized sports betting—a growing group that includes one of the Respondents[5]—will be incentivized to file "reverse PASPA" lawsuits in an effort to undo sweeping injunctions secured by other sports leagues in various jurisdictions. All of this could result if the district court's flawed statutory interpretation of PASPA is not corrected.

The district court's impermissibly broad injunction should be vacated and remanded for further consideration into whether Respondents have "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical'" sufficient to obtain injunctive relief under PASPA for themselves and others. *Spokeo v. Robins*, 136 S. Ct. 1540, 1548 (2016) quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[6]

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[4] Since this case started, over a dozen states have enacted new laws permitting private daily fantasy sports companies to operate.

[5] One month after filing this PASPA lawsuit against Petitioners, one of the Respondents—the NBA—publicly reversed course on its previously held stance against legalized sports betting. Adam Silver, *Legalize Sports Betting*, NEW YORK TIMES (Nov. 14, 2014).

[6] The Court has expressed "serious constitutional doubt" whether Congress can statutorily establish standing if Article III's threshold requirements are not met. *Gollust v. Mendell*, 501 U.S. 115, 125 (1991). "Although 'Congress may grant an express right

II. Two Portions of the Professional and Amateur Sports Protection Act Are Unconstitutional and Severable

Petitioners argue that PASPA should be declared unconstitutional *in toto* as a violation of the anti-commandeering doctrine. Petitioners root their arguments firmly in § 3702, PASPA's general ban on sports betting. Such placement is tenuous. The Court has previously upheld Congress' power to regulate gambling nationwide under the Commerce Clause.

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of action to persons who otherwise would be barred by prudential standing rules, Art[icle] III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself.'" *Id.* quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975); see also John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993). The Third Circuit emphasized that plaintiff injuries must be "based in reality." *Doe v. Nat'l Bd. of Medical Examiners*, 199 F.3d 146, 153 (3d Cir. 1999). To date, the parties have not disputed jurisdiction in this case. However, the Court "bear[s] an independent obligation to assure [itself] that jurisdiction is proper." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008). "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Cases become moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). Plaintiffs "must maintain a 'personal stake' in the outcome of the litigation throughout its course." *Gollust v. Mendell*, 501 U.S. 115, 125 (1991) quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395-97 (1980). Issues about justiciability can even be raised by *amicus curiae* as late as oral argument. *Honig v. Doe*, 484 U.S. 305, 317 n.5 (1988).

Champion v. Ames, 188 U.S. 321, 326-30 (1903).[7] Indeed, during oral argument, counsel for Petitioners conceded this point, confirming that Congress could "have simply banned all sports betting." Transcript of Oral Argument at 62, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, Nos. 14-4546, 14-4568, 14-4569, 799 F.3d 259 (3d Cir. Mar. 17, 2015).

PASPA is unconstitutional for two mutually exclusive reasons outside of Petitioners' anti-commandeering argument. PASPA violates both the equal sovereignty doctrine and the private nondelegation doctrine. These two unconstitutional portions can be severed from PASPA's core, a result supported by Court precedent. In *United States v. Booker*, the Court concluded that courts should "refrain from invalidating more of the statute than is necessary." 543 U.S. 220, 258 (2005). Relatedly, there is a "presumption...in favor of severability." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984).

A. The Professional and Amateur Sports Protection Act's Preferences for Certain States Via a Permanent Grandfathering Clause Violates the Equal Sovereignty Doctrine

The "purpose of [PASPA] is to prohibit sports gambling conducted by, or authorized under the law of, any State or other governments." S. REP. NO. 102-248 at 3, *Professional and Amateur Sports Protection* (1991). Sports betting was described as a "national

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[7] The Court has also upheld Congressional power to ban gambling generally as a vice activity. *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

problem" that "cannot be limited geographically." *Id.* at 5. Accordingly, PASPA includes a blanket ban on sports gambling in § 3702.

PASPA's general ban on sports betting is subject to several exemptions under § 3704(a); two exemptions are relevant to analyzing PASPA under the equal sovereignty doctrine. PASPA § 3704(a)(1) exempts sports lotteries "to the extent that the scheme was conducted...at any time during the period beginning January 1, 1976, and ending August 31, 1990." PASPA § 3704(a)(2) exempts sports gambling that was "authorized by statute as in effect on October 2, 1991 [and] actually was conducted...at any time during the period beginning September 1, 1989, and ending October 2, 1991." PASPA's text does not mention by name the exempt States, but PASPA's legislative history alludes to no fewer than nine States as being exempt in some way: (i) Nevada; (ii) Delaware; (iii) Oregon; (iv) Montana; (v) North Dakota; (vi) Arizona; (vii) South Dakota; (viii) New Mexico; and (ix) Wyoming.[8] Ryan M. Rodenberg and John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L. J. ONLINE at 16 (2017).

As derived from the Tenth Amendment, the equal sovereignty doctrine's test is easily summarized: "[A] departure from the fundamental principle of equal

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[8] Beyond exemptions for certain States, PASPA's legislative history suggests certain Native American tribes may be exempt too: "An Indian tribe may conduct, and may allow to be conducted, on lands of the tribe in a State, only those particular sports gambling schemes that were in operation on such lands prior to August 31, 1990." S. REP. NO. 102-248 at 10, *Professional and Amateur Sports Protection* (1991).

sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203. Further, "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions." *Shelby County*, 133 S. Ct. at 2629.

In *Shelby County*, the Court made two other points relevant to the PASPA context here. First, the Court highlighted that the portion of the Voting Rights Act at issue was temporary in nature. *Id.* at 2625. Second, the Court recognized that invalidating one severable portion of the Voting Rights Act would not disturb the statute's blanket ban on racial discrimination in voting. *Id.* at 2631.

PASPA's unconstitutionality under the equal sovereignty doctrine is triggered by its exemptions under § 3704(a)(1) and § 3704(a)(2), not PASPA's general ban on sports gambling in § 3702. The resulting discrimination between States manifests itself in two ways. First, PASPA differentiates favored grandfathered States and non-grandfathered States, with the latter completely barred from legalizing sports betting within their borders. Second, Nevada is treated more favorably than some of the other exempted States. Both tiers of state-level distinctions violate the equal sovereignty doctrine.

Far from being "sufficiently related to the problem that it targets," PASPA's permanent exemptions for at least nine States are completely divorced from any relationship to the "national problem" of sports gambling. PASPA stands alone in this regard: "[T]here is no recognizable legislative precedent for perpetually

allowing purportedly undesirable behavior in certain jurisdictions, but not others." John T. Holden, Anastasios Kaburakis & Ryan M. Rodenberg, *Sports Gambling and Your Grandfather (Clause)*, 26 STAN. L. & POL'Y REV. ONLINE 1, 7-8 (2014). This permanency contravenes the Court's mandate that divisions between the States must make "sense in light of current conditions." PASPA's permanent grandfather clause precludes sports wagering in disfavored States forever. All of these factors firmly place PASPA's exemptions for certain States in unconstitutional territory *vis-à-vis* the equal sovereignty doctrine.

According to the Third Circuit, "the Supreme Court, while testing the constitutionality of a 'grandfather' provision, has emphasized the importance of articulating the legislative purpose." *Delaware River Basin Comm'n v. Bucks County*, 641 F.2d 1087, 1095 (3d Cir. 1981).[9] PASPA's grandfather clause is unsupported by the statute's legislative history. The Court has already looked at the rationale behind PASPA's exemptions, finding "some with obscured Congressional purposes." *Greater New Orleans Broadcasting Ass'n, Inc. et al. v. United States*, 527 U.S. 173, 179 (1999). Likewise, counsel for Respondents previously argued that the legislative history pertaining to PASPA's carve-outs was "undeniably muddled" and "internally inconsistent." Brief in Opposition at 17, *Gov. Markell v. Office of the Comm'r of Baseball*, No. 09-914, 559 U.S. 1106, *cert.*

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[9] *Delaware River Basin* cited two Court decisions for this finding: *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970) (per curiam) and *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936).

denied (2010). These findings cut against any reasonable justification Congress may have had to differentiate between the States on the issue of sports gambling.

Devoid of justification and unrelated to PASPA's goal of banning sports betting, PASPA's state-differentiating exemptions in § 3704(a)(1) and § 3704(a)(2) are unconstitutional under the equal sovereignty doctrine and should be severed from the remainder of the statute.

B. The Professional and Amateur Sports Protection Act's Conferral of Regulatory Power to Sports Leagues for Use Against States Violates the Private Nondelegation Doctrine

Prior to PASPA's enactment, the DOJ told Congress that it was "particularly troubling that [PASPA] would permit enforcement of its provisions by sports leagues." Letter from W. Lee Rawls, Assistant Attorney General, Department of Justice, to the Honorable Joseph R. Biden, Jr., Chairman, Committee on the Judiciary (Sept. 24, 1991). The DOJ did not elaborate on its finding, but *amicus curiae* does here.

Through PASPA, Congress has unconstitutionally delegated regulatory power over sports gambling to self-interested sports leagues in violation of the private nondelegation doctrine as derived from Article I and set forth by the Court in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and discussed, most recently, in *Dep't*

of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225 (2015).[10] Via the deputizing provision of PASPA § 3703, Congress has delegated the authority to shape federal sports gambling policy to private entities, with PASPA-backed sports leagues left to choose whether to regulate or not according to their own interests.[11] Petitioners—and potentially other States—are deprived of basic due process protections as a result.

The Court's "so-called 'private nondelegation doctrine' flows logically from the three Vesting Clauses." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135

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[10] Senator Bill Bradley explained how PASPA is tethered to Congressional lawmaking efforts: "To aid in the enforcement of this legislative goal of proscribing sports betting, [PASPA] authorizes parties such as the [DOJ] and any affected sports organization to seek injunctive relief against an infringement of the act." Bill Bradley, *The Professional and Amateur Sports Protection Act - Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. OF SPORT L. 5, 9 (1992).

[11] Oregon State Lottery director James J. Davey elaborated in Congressional testimony: "While it is true the federal government has regulated interstate wagering, the federal government has not attempted to tell the states what they can do within their own borders. This legislation would do precisely that. Moreover, it would delegate to private parties, the professional sports leagues, the power to enforce these restrictions against the sovereign states. If Congress can enact this legislation, what is to stop it from prohibiting state lotteries altogether in favor of a national lottery, or of authorizing other private parties to enforce their 'special interests' against the states." Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcommittee on Economic and Commercial Law of the House of Representatives Committee on the Judiciary at 158, 102d Congress (Sept. 12, 1991). Massachusetts State Lottery director Thomas O'Heir agreed: "[PASPA] would delegate to private parties the power to enforce...restrictions against the States." *Id.* at 168.

S. Ct. 1225, 1252 (2015) (Justice Thomas concurring). The doctrine's constraints on congressional authority are "merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private." *Id.* The risks of such an arrangement are considerable: "One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern." *Id.* at 1234 (Justice Alito concurring).[12]

The Federal Government has repeatedly positioned PASPA as a regulatory statute. According to the DOJ in 2009, "Congress enacted PASPA...intending to further regulate interstate sports gambling." Federal Defendants' Opposition to Governor Jon S. Corzine's Motion to Intervene at 1, *Interactive Media Entm't & Gaming Ass'n v. Holder*, No. 09-1301, 2011 WL 802106 (D.N.J. July 20, 2009). The DOJ elaborated a year later: "To regulate sports betting, an activity with uncontested effect on interstate commerce, Congress enacted a national policy." Reply in Support of Federal Defendants' Motion to Dismiss at 7, *Interactive Media Entm't & Gaming Ass'n v. Holder*, No. 09-1301, 2011 WL 802106 (D.N.J. Oct. 18, 2010). In 2014, the Solicitor General wrote: "PASPA does not merely limit

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[12] Such concerns implicate the Constitution's structure too: "The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. See *INS v. Chadha*, 462 U.S. 919, 959 (1983). It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1237 (2015) (Justice Alito concurring).

the regulatory reach of the States; it directly regulates private conduct as well." Brief for the United States in Opposition at 17, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, Nos. 13-967, 13-979 and 13-980 (May 2014). According to the Solicitor General in 2017, "portions of [§] 3702(1) permissibly 'regulate[] state activities.'" Brief for the United States as Amicus Curiae at 13, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, Nos. 16-476 and 16-477 (May 2017) quoting *South Carolina v. Baker*, 485 U.S. 505, 514 (1988).

The way PASPA regulates—as demonstrated in this case with the Federal Government absent as a litigant and only Respondents furthering the PASPA claims against Petitioners—is by outsourcing a form of privatized regulatory power for unilateral use against the States. PASPA is also a purely elective statute as evidenced by the discretionary word "may" in § 3703, giving rise to the possibility of selective enforcement. Such a regulatory apparatus violates the private nondelegation doctrine.

The Court has largely allowed Congress to delegate rulemaking power to other governmental entities. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); see also *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). However, since *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), the Court has made clear that delegations of regulatory power to private non-governmental entities is prohibited as a "denial of rights safeguarded by the due process clause of the Fifth Amendment." In *Carter Coal*, the Court explained that a delegation to a private party "is legislative delegation in its most obnoxious form; for it is not even

delegation to an official or an official body, presumptively disinterested, but to private persons whose interest may be and often are adverse to the interests of others in the same business." *Id.*; *see also Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (challenged statute was permissible because it did not "delegate regulatory power to private individuals").

The Court recently revisited this issue in *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015). There, the Court reversed a decision finding a violation of the private nondelegation doctrine on the basis that the regulator in question, Amtrak, was a government actor, not a private party. The Respondents in this case are undoubtedly private entities. When delegating to private parties, "there is not even a fig leaf of constitutional justification." *Id.* at 1237 (Justice Alito concurring). Further, "[b]y any measure, handing off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'" *Id.* at 1238, quoting *Carter Coal*, 298 U.S. at 311.

The rationale underpinning the private nondelegation doctrine relates to the Appointments Clause barring private parties from exercising "significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Through PASPA, private sports leagues are empowered to file suit against States and non-governmental entities operating pursuant to state or local law.[13] Such power is significant, as it carries with

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[13] The Senate Report accompanying PASPA did allude to one constraint of sports leagues: "The committee would like to make it clear that this bill does not benefit professional sports financially. It does not reserve the right to the leagues to hold their own sports

it the ability to shape sports gambling laws nationwide. PASPA gives sports leagues a substantial role in determining what types of sports betting are either legal or illegal. For example, counsel for Respondents opined during oral argument that States could comply with PASPA via a partial repeal of its own laws pertaining to sports "wagers under $100 between personal acquaintances or family members." Transcript of Oral Argument at 44, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, Nos. 14-4546, 14-4568, 14-4569, 799 F.3d 259 (3d Cir. Mar. 17, 2015).

The lessons of *Carter Coal* and *Ass'n of Am. R.R.* are directly applicable to the sports gambling context in this case. Through PASPA, Congress has delegated regulatory power to private sports leagues on par with that of the DOJ. Since enactment, only private sports leagues have initiated PASPA lawsuits against States. The Attorney General has never initiated a PASPA lawsuit.

Ten years ago, the Respondents communicated a private-nondelegation-doctrine-related concern to Congress, expressing reservations about private parties' role in banning gambling. The year after the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA") was enacted, Congress considered a House bill (H.R. 2046) that would roll back some of UIGEA's restrictive internet gambling provisions. 31 U.S.C. § 5361 *et seq.*

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gambling operations. They are clearly prohibited under this bill from instituting their own sports betting scheme." S. REP. 102-248 at 8, *Professional and Amateur Sports Protection* (1991).

Included in the draft bill was an opt-out clause permitting sports leagues to prohibit internet gambling on affiliated sporting events. The NFL, MLB, NBA, NHL, and NCAA—the same five sports leagues who are the Respondents here—sent a May 31, 2007 letter to Congress in opposition to H.R. 2046 generally and the opt-out provision specifically.[14] In relevant part, the Respondents wrote:

> [T]he opt-outs are subject to challenge in U.S. courts on the grounds that Congress has unconstitutionally delegated its lawmaking power (to ban Internet gambling) to private parties (commissioners of various sports leagues and conferences). Letter from Rick Buchanan (NBA), Elsa Kircher Cole (NCAA), William Daly (NHL), Tom Ostertag (MLB) & Jeffrey Pash (NFL) to Members of the House Financial Services Committee (May 31, 2007).

The grant of opt-in regulatory power under PASPA is functionally analogous to the proposed opt-out clause the Respondents argued against in their joint 2007 letter to Congress. PASPA's conferral of broad sports gambling regulatory power to private sports leagues is also in direct conflict with Congress' finding that "the States should have the primary responsibility for

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[14] Two years later, one of the Respondents—the NFL—similarly cautioned the Delaware Supreme Court against allowing a delegation of regulatory power to a government official in developing "specific sports betting games" when Delaware was considering expanding its sports lottery options. Brief of the Nat'l Football League as Amicus Curiae in Support of the Negative Position at 13, No. 150-2009, *In re Request of the Governor for an Advisory Opinion*, 12 A.3d 1104 (Del. May 9, 2009).

determining what forms of gambling may legally take place within their borders." 15 U.S.C. § 3001(a)(1).[15] In accord, the DOJ posited that "it is left to the states to decide whether to permit gambling activities based upon sporting events." Letter from W. Lee Rawls, Assistant Attorney General, Department of Justice, to the Honorable Joseph R. Biden, Jr., Chairman, Committee on the Judiciary (Sept. 24, 1991). Under PASPA, sports leagues have priority over States in this regard.

Others have expressed similar concerns. According to Iowa Senator Chuck Grassley, "[PASPA] would prohibit purely intrastate activities. The Federal Government also has never authorized private parties to enforce such restrictions against the States. This legislation would do so." S. REP. 102-248 at 12, *Professional and Amateur Sports Protection* (1991). Two commentators concurred: "PASPA is vulnerable to constitutional challenges based on its procedural mechanisms. . . PASPA is a facially unprecedented law, giving sports organizations the ability to trump state legislators." I. Nelson Rose and Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45(2) CONN. L. REV. 653, 687 (2012).

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[15] This finding is consistent with a prior statement made by executives from Respondents: "[w]hether you think gambling liberalization is a bad idea or a good one, the policy judgments of State legislatures and Congress must be respected." Letter from Rick Buchanan (NBA), Elsa Kircher Cole (NCAA), William Daly (NHL), Tom Ostertag (MLB) & Jeffrey Pash (NFL) to Members of Congress (July 30, 2007).

The Congressional Record includes evidence of Respondents' role in setting PASPA's parameters before the statute was enacted too. During an October 7, 1992 debate on the Senate floor, New Mexico Senator Pete Domenici asked Arizona Senator Dennis DeConcini if New Mexico's law permitting "Keirin" bicycle race betting would be exempt under PASPA. The verbatim transcript is below:

> **Senator Domenici**: So, it is my understanding that my good friend from Arizona cleared the possibility of exempting Keirin from the provisions of this bill with our Nation's major sports organizations, the national [sic] Football League, the National Basketball Association, Major League Baseball, the National Hockey League, and the National Collegiate Athletic Association, to ensure they had no concerns.
> **Senator DeConcini**: It is my understanding that the leagues and the NCAA do not object to this type of pari-mutuel bike racing and did not intend for the bill to cover such a sport. 138 CONG. REC. 33,823 (Oct. 7, 1992) (statements of Sen. Domenici and Sen. DeConcini)

PASPA's delegation of regulatory power to self-interested private sports leagues is the type of unconstitutional conferral the private nondelegation doctrine addresses. Outsourcing to private actors the ability to commandeer States' choices regarding sports gambling regulation is pernicious to constitutional due process considerations, as it vanquishes any political accountability. The impact on Petitioners has been particularly severe. The will of New Jersey's voters, legislature, and governor was overridden by a

congressional delegation of power to private parties. The discretionary nature of PASPA's conferral of regulatory authority to private entities puts coercive pressure on States to only pass sports wagering laws that meet with Respondents' approval.[16]

If PASPA's outsourcing of regulatory power to private entities is upheld, the policy implications will be profound. Congress could be emboldened to statutorily skirt due process protections via legislation that empowers private entities to sue sitting state governors and other state public officials whenever

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[16] For example, in 2009, one of the Respondents—the NFL—sent a letter to Delaware Governor Jack Markell that read, in relevant part: "I have read recent reports that your office is reviewing the possible establishment of a sports lottery in Delaware. The NFL's position on such lotteries that involve our games is that they are an additional threat to the integrity of our league and contrary to the public good. We strongly urge you to reject any proposal to permit a sports lottery in Delaware. We appreciate the financial difficulties that Delaware faces in today's economic times. We hesitate to interject ourselves into your state's affairs. However, when pro-gambling forces in Delaware advocate the use of our NFL games and players as betting vehicles, we do not believe it is in our best interests to stay on the sidelines. ... We remain hopeful that the legislature will not pass—and you will not support—any bill that permits a sports lottery in Delaware. However, if a sports lottery is authorized, the NFL will necessarily give the final proposal the most careful scrutiny, both to protect the rights of our member clubs and to ensure that any lottery complies with strict federal law and the restrictions of the Delaware Constitution (emphasis in original)." Letter from Roger Goodell, National Football League, to the Honorable Jack Markell, Governor of Delaware (Mar. 17, 2009). The same five sports leagues who are Respondents in this case subsequently filed a PASPA lawsuit against Gov. Markell. *Office of the Comm'r of Baseball, et al. v. Gov. Markell*, 579 F.3d 293 (3d Cir. 2009) *cert. denied*, 559 U.S. 1106 (2010).

States pursue measures to regulate certain industries or implement voter-approved referendums inconsistent with Congress' then-existing leanings. Examples outside of PASPA and sports betting are plentiful.

What if Congress banned certain States from enacting or amending a minimum wage law and delegated follow-up regulatory efforts—via civil litigation seeking injunctive relief against state officials trying to boost wages among hourly workers—to private fast food companies who oppose high minimum wages? Or, what if Congress prohibited the vast majority of States from enacting laws to address hydraulic fracturing, with private oil and natural gas companies statutorily deputized to sue governors who signed fracking legislation? Such hypotheticals seem absurd, but both mimic how PASPA operates in the sports wagering context. In this case, five sports leagues who claimed to have an anti-sports gambling stance twenty-five years ago have now weaponized PASPA to prevent some States from enacting certain forms of sports betting legislation.

The portion of PASPA in § 3703 that confers regulatory power to sports leagues for use against the States is unconstitutional under the private nondelegation doctrine and is severable from the remainder of PASPA. By severing the unconstitutional portion of § 3703, the Court would simply be narrowing PASPA's jurisdictional authority to the Federal Government only. Such severing would cleanse PASPA of its current private nondelegation doctrine infirmities.

CONCLUSION

Under PASPA, disfavored States are bereft of options to address sports gambling within their borders. States without sanctuary under PASPA's grandfather clause can either (i) do nothing in a pressing area of concern or (ii) be susceptible to repeated regulatory litigation initiated by private actors. Such a Hobson's choice is unconstitutional.

The parties have positioned this case for resolution on anti-commandeering grounds under *New York* and *Printz*. Such positioning is misplaced. PASPA differs markedly from the statutes invalidated in *New York* and *Printz*. Through PASPA, Congress has directed States not to legislatively address sports gambling, while effectively leaving the regulatory enforcement of PASPA's decree to self-interested private parties. Also, via a grandfather clause, PASPA mandates that its ban on sports gambling only applies to certain States. This type of "outsourced commandeering" that applies in some States, but not others, puts PASPA in an unconstitutional territory far removed from *New York* and *Printz*.

Beyond PASPA's two-pronged unconstitutionality under the equal sovereignty doctrine and the private nondelegation doctrine, the district court also erroneously granted injunctive relief to non-litigant third parties. The lower court's misinterpretation of PASPA's text presents the Court with a non-constitutional option to resolve the case, as the underlying injunction should be vacated and the case remanded. *Amicus curiae* submits that these alternatives provide the Court with the framework for deciding this case.

July 21, 2017

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In the Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, ARIZONA, LOUISIANA, MISSISSIPPI, AND WISCONSIN IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Federal law does not directly prohibit sports wagering where it occurs in a State in which it is legal. But the Professional and Amateur Sports Protection Act ("PASPA") makes it unlawful for a State, other than Nevada or several other exempted States, to "license" or "authorize" sports wagering. 28 U.S.C. § 3702. The *en banc* Third Circuit, over two dissents, has interpreted this provision as prohibiting the States from modifying their laws to repeal existing prohibitions on sports wagering.

The question presented is:

Does PASPA's prohibition on States repealing existing laws banning sports wagering commandeer the regulatory authority of the States, in violation of the Tenth Amendment?

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SUMMARY OF ARGUMENT AND INTEREST OF *AMICI CURIAE*

Certiorari is warranted because the Third Circuit's split *en banc* decision below conflicts with two lines of this Court's precedent concerning federal-state relations. In upholding the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et seq.*, the Third Circuit radically expanded the doctrine of federal preemption by holding that Congress may forbid the States from repealing their existing laws without affirmatively setting forth a federal regulatory or deregulatory scheme. In addition, the Third Circuit disregarded this Court's anti-commandeering jurisprudence by requiring state legislators to maintain, and state executive officials to enforce, laws that would otherwise have been repealed.

Amici curiae are States that submit this brief in support of Petitioners because the Third Circuit's decision fundamentally alters the nature of federal-state relations. The concern of *Amici* States—the States of West Virginia, Arizona, Louisiana, Mississippi, and Wisconsin—is not *what* Congress regulates but *how* it does so. Even where it has Article I authority to act, Congress may not force the States to act as the vehicle for implementing federal policy and thereby shift to the States political accountability for its actions. Such coercion is unconstitutional commandeering and not lawful preemption under the Supremacy Clause. This

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* Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel of record of their intent to file this brief in support of Petitioners.

coercion also violates a core principle of residual sovereignty protected by the Tenth Amendment—the right of the States to repeal laws and return liberty to the People in areas where Congress has chosen not to regulate.

Importantly, *Amici* States take no position on the wisdom of the state and federal sports wagering laws in this case. Some States may support the expansion of sports betting, while others oppose it. *Amici* States file this brief because they agree that the Third Circuit's decision raises serious federalism concerns for all States.

REASONS FOR GRANTING THE PETITION

This Court has long explained that our system of dual sovereignty limits Congress's ability to directly regulate a State's regulation. It may "encourage a State to regulate in a particular way" by "hold[ing] out incentives to the States as a method of influencing a State's policy choices." *New York v. United States*, 505 U.S. 144, 166 (1992). Moreover, where Congress seeks "to regulate matters directly" through an affirmative federal regime, the Supremacy Clause authorizes "pre-empt[ion] [of] contrary state regulation." *Id.* at 178. But Congress may not simply "regulate state governments' regulation," *id.* at 166, as "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions," *id.* at 162.

The petition should be granted because the Third Circuit has *twice* failed to respect these limits on federal power.

In 2013, a divided Third Circuit panel acknowledged that interpreting PASPA to prohibit States from repealing existing laws would raise "a series of constitutional problems." Pet. App. 160a. But the court purported to avoid those problems by construing PASPA as not "prohibit[ing]" a State from "repealing its ban on sports wagering." *Id.* at 158a, 160a. Rather, the court reasoned, States enjoyed "much room . . . to make their own policy," *id.* at 161a, because they only needed to "enforce the laws they choose to maintain," *id.* at 163a, and avoid affirmative acts such as issuing gambling licenses, *id.* at 158a. Apart from these proscriptions, States

could lawfully allow sports betting simply by removing existing laws from the books. See *id.* at 158a, 161a, 163a.

The State of West Virginia previously explained to this Court that this "affirmative/negative command distinction," *id.* at 37a, 157a, could not withstand scrutiny under well-established anti-commandeering principles. See No. 13-967, Amicus Br. of West Va. *et al.*, at 13–23 (Mar. 17, 2014). Among other reasons, this Court's case law prohibits Congress from using the machinery of state government to carry out federal policy, regardless of the form that state action takes. *Id.* at 14–19. Furthermore, it would often be difficult in practice to distinguish between an impermissible authorization and a permissible repeal. *Id.* at 20–21.

Perhaps recognizing these difficulties, the *en banc* Third Circuit has now rejected as "unnecessary dicta" its prior distinction between a "repeal" and an "authorization." Pet. App. at 23a. But the *en banc* court proceeded to compound the earlier panel's misunderstanding of the Tenth Amendment by further restricting the room in which States have to modify existing legislation on sports wagering.

Over two dissents, including one by the author of the 2013 panel decision, the *en banc* court held that a State's "selective repeal of certain prohibitions amounts to authorization under PASPA." *Ibid.* Despite now interpreting PASPA to prohibit state repeals of existing wagering laws, the court concluded that its view of PASPA's constitutionality "remains unshaken" because States were still afforded "sufficient room under PASPA to craft their

own policies." *Ibid.* Specifically, the court suggested that federal prohibitions on state regulation were lawful so long as they did not subject the States to a "coercive binary choice," that is, require States to "either maintain a complete prohibition on sports wagering or wholly repeal state prohibitions." *Id.* at 17a–18a, 23a. The court declined, however, to "articulate a line" as to what additional state actions other than total repeal of all gaming laws would be permissible under its new reading of PASPA and the Tenth Amendment. *Id.* at 24a.

As shown below, the Third Circuit's decision dramatically departs from this Court's jurisprudence on both preemption and anti-commandeering. *First*, this Court's preemption cases make clear that if Congress enacts an affirmative federal regime, it may also enact an express preemption clause to protect that regime from contrary action by the States. But this Court has never recognized that the Supremacy Clause permits Congress to merely prohibit States from repealing their laws when there is no affirmative federal regime to protect. *Second*, the Third Circuit's decision violates core anti-commandeering principles protected by the Tenth Amendment by prohibiting States from repealing existing law and returning residual sovereignty to the People in areas where Congress has expressly chosen not to legislate.

If permitted to stand, the Third Circuit's decision threatens the constitutional balance of power between States and the federal government. This Court's review is needed to reinforce the proper line

between permissible preemption and impermissible commandeering.

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT CONCERNING FEDERAL-STATE RELATIONS.

A. The Third Circuit's View of Preemption Conflicts With This Court's Case Law.

1. In this Court's cases, the preemption of state law is something that occurs, pursuant to the Supremacy Clause, when necessary to protect the integrity of the federal government's own affirmative efforts to govern directly. As this Court has often explained, it has in its cases found state law preempted in three circumstances. *First*, Congress might "enact[] a statute containing an express preemption provision." *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012). *Second*, "state laws are preempted when they conflict with federal law." *Id.* at 2501. *Third*, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Ibid.* The consistent strand throughout the cases is the existence of valid federal law seeking to govern the country directly. See, *e.g.*, *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981).

In cases of conflict or field preemption, the affirmative federal law is central to the Court's analysis. The question in every one of those cases, after all, is whether the existence of some affirmative federal law *implies* the displacement of a particular

state law. For conflict preemption, this requires close scrutiny of the federal law to determine whether it makes compliance with the challenged state law "'a physical impossibility,'" *Arizona*, 132 S. Ct. at 2501 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)), or whether the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *ibid.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). For field preemption, a court must determine whether the federal law is "so comprehensive[] that it has left no room for supplementary state legislation." *R.J. Reynolds Tobacco Co. v. Durham Cnty., N.C.*, 479 U.S. 130, 140 (1986).

In cases of express preemption, the focus tends instead to be on a specific preemption clause—often a single sentence in a statute—but there is always an overarching affirmative federal law, as well. See, *e.g.*, *Am. Trucking Ass'ns, Inc. v. City of Los Angeles, Ca.*, 133 S. Ct. 2096 (2013) (Federal Aviation Administration Authorization Act of 1994); *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (Federal Employees' Group Life Insurance Act of 1954); *Arizona*, 132 S. Ct. 2492 (Immigration Reform and Control Act of 1986); *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012) (Federal Meat Inspection Act); *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, 555 U.S. 285 (2009) (Employee Retirement Income Security Act of 1974); *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431 (2005) (Federal Insecticide, Fungicide, and Rodenticide Act); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (Clean Air Act); *Nixon v. Mo. Mun.*

League, 541 U.S. 125 (2004) (Telecommunications Act); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (Federal Boat Safety Act); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (Federal Cigarette Labeling and Advertising Act); *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000) (National Traffic and Motor Vehicle Safety Act); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (Medical Device Amendments to the Federal Food, Drug and Cosmetic Act); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (Airline Deregulation Act); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (Federal Railroad Safety Act); *Aloha Airlines, Inc. v. Dir. of Taxation of Haw.*, 464 U.S. 7 (1983) (Airport and Airway Development Acceleration Act of 1970); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

As this Court has said, an express preemption clause makes explicit what courts infer in finding conflict or field preemption: that certain state laws contravene an affirmative federal regime. See *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1977 (2011) (describing an "express preemption clause" as "the best evidence of Congress' preemptive intent" (internal quotations omitted)). Rather than relying on the courts to later discern whether a state law interferes with an affirmative federal law, Congress is permitted by the Supremacy Clause simply to enact "a statute *containing* an express preemption provision" that makes clear which state laws must give way to the new federal regime. *Arizona*, 132 S. Ct. at 2500-01 (emphasis added); see also *Easterwood*, 507 U.S. at 664 (noting that a federal statute may "contain[]" an express preemption clause); *Sprietsma*, 537 U.S. at 62

(same). When added to an affirmative federal law, an express preemption clause serves to protect that federal scheme from state laws that would impose inconsistent rules.

This Court's cases illustrate this use of express preemption clauses not only as part of federal regulatory regimes, but also *deregulatory* regimes. For example, in 1978 Congress enacted the Airline Deregulation Act ("ADA"), which shifted the focus in that industry from complex government regulation to "maximum reliance on competitive market forces." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (internal quotations omitted). And "[t]o ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law relating to rates, routes, or services of any air carrier." *Id.* at 378 79 (internal quotations omitted). Similarly, Congress "deregulated trucking" in 1980. *Rowe v. N.H. Motor Transport Ass'n*, 552 U.S. 364, 368 (2008). Then, in 1994, Congress sought to ensure that the States would not "undo federal deregulation" and thus adopted a law "pre-empt[ing] state trucking regulation." *Ibid.* (internal quotations omitted). In both cases, Congress adopted a federal deregulatory regime and added an express preemption clause to protect that regime by prohibiting action by the States.

All of these cases—whether concerning express, conflict, or field preemption—reflect this Court's description of the Supremacy Clause as a rule of priority between federal and state law. It is, of

course, well known that the Constitution "establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). But "[f]rom the existence of two sovereigns follows the possibility that [state and federal] laws can be in conflict or at cross-purposes." *Arizona*, 132 S. Ct. at 2500. The Supremacy Clause, this Court has explained, "provides a clear rule that federal law 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Ibid.* (quoting U.S. Const. art. VI, cl. 2).

2. The Third Circuit's analysis, however, ignores the critical relationship between the preemptive effect of federal law and Congress's affirmative decision to regulate (or deregulate) in an area within its enumerated powers. Rather, the Third Circuit claimed that "congressional action in passing laws in *otherwise pre-emptible fields* has withstood attack in cases where the states were not compelled to enact laws or implement federal statutes or regulatory programs themselves." Pet. App. 19a. In other words, the Third Circuit suggested that, so long as a particular field is "otherwise pre-emptible," Congress may prevent States from acting even if it declines to create a federal regulatory regime itself. See *ibid.*

But the cases that the court relied on in support—*Hodel* and *FERC v. Mississippi*, 456 U.S. 742 (1982)—belie this conclusion. As the court acknowledged, these cases involve the protection of actual federal regulatory schemes. See Pet. App. 19a (noting that *Hodel* involved "a law that imposed

federal standards for coal mining"); *id.* at 20a (noting that *FERC* required states to "'consider' enacting federal standards"). In both those cases, Congress protected the federal regime not by excluding the States, but by permitting them to remain in the field under certain conditions. See *Printz v. United States*, 521 U.S. 898, 925–26 (1997) ("In *Hodel* we . . . concluded that the Surface Mining Control and Reclamation Act of 1977 did not present [a Tenth Amendment] problem . . . because it merely made compliance with federal standards a precondition to continued state regulation. . . ."); *FERC*, 456 U.S. at 765 ("PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards.").

In sum, this Court's cases make clear that if Congress enacts an affirmative federal regime, it may also enact an express preemption clause to protect that regime from contrary action by the States. But this Court has never recognized—as the Third Circuit now has—that the Supremacy Clause endows Congress with the substantive authority to forbid States from acting in "otherwise pre-emptible fields" when there is no affirmative federal regime to protect. See Pet. App. 19a. The Supremacy Clause has been held to give primacy to valid federal laws over contrary state laws, but it has never been construed as a license to Congress to prohibit state lawmaking whenever and however it desires. See *New York*, 505 U.S. at 178 ("The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state

regulation."). This Court should grant certiorari to resolve the conflict between this Court's jurisprudence and the Third Circuit's approach to preemption.

B. The Third Circuit Decision Also Conflicts With This Court's Anti-Commandeering Jurisprudence.

This Court has also made clear that, under the Tenth Amendment to the U.S. Constitution, Congress may not "regulate state governments' regulation." *New York*, 505 U.S. at 166. Yet that is precisely what PASPA does, under the Third Circuit's interpretation: it directly prohibits States (with a few grandfathered exceptions) from repealing bans on sports wagering within their borders.

Just as it radically departed from this Court's preemption case law, the Third Circuit also fundamentally misconstrued this Court's anti-commandeering jurisprudence. The Third Circuit upheld PASPA because, in its view, the statute did not "present[] states with a binary choice—either maintain a complete prohibition on sports wagering or wholly repeal state prohibitions." Pet. App. 17a–18a. The court concluded that Congress still left "sufficient room under PASPA to craft their own policies," even though the court declined to explain exactly what actions, short of a total repeal of all sports wagering laws, would be permissible. *Id.* at 23a.

This Court's test for commandeering, however, does not turn on whether federal legislation leaves the States with something more than a "binary

choice." Rather, as explained below, this Court has made clear that anti-commandeering doctrine exists to ensure that the state and federal governments each remain directly accountable for their own actions. What matters is whether Congress has obscured its own responsibility by forcing state governments to carry out federal policy rather than doing so itself. And that can occur—contrary to the Third Circuit's conclusion—whether or not Congress restricts the States to a "coercive binary choice." *Id.* at 23a.

1. **The Political Accountability Principles At The Core Of This Court's Anti-Commandeering Cases Do Not Accord With The Third Circuit's "Coercive Binary Choice" Test.**

a. This Court has explained that the anti-commandeering doctrine flows directly from the Framers' decision to adopt a structure of dual sovereignty. In drafting the Constitution, the Framers deliberately rejected a system of government in which Congress would "employ state governments as regulatory agencies." *New York*, 505 U.S. at 163. Indeed, that was the model under the Articles of Confederation, and "[t]he inadequacy of th[at] governmental structure was responsible in part for the Constitutional Convention." *Ibid.* At the Convention, two proposals "took center stage," *id.* at 164, and the Framers "explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States," *id.* at 166.

The point of the new governmental structure was to establish dual sovereigns, with each directly

responsible to its citizens for its own actions. The Framers determined that "[t]he new National Government 'must carry its agency to the persons of the citizens. . . . [and] address itself immediately to the hopes and fears of individuals.'" *Id.* at 163 (quoting *The Federalist* No. 16, at 111 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Likewise, "a State's government [would] represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920. The "great innovation of th[e] design" was "'a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Ibid.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

The anti-commandeering doctrine safeguards this system of dual sovereignty and clear accountability. When state and federal governments act separately and directly on their citizens, each is publicly exposed as responsible for its actions, and each must bear the electoral consequences of those actions. If the citizens of a State do not agree with a certain state policy, for example, "they may elect state officials who share their view." *New York*, 505 U.S. at 168. And if that view is contrary to the national view, it "can always be pre-empted under the Supremacy Clause," and then "federal officials [will] suffer the consequences if the decision turns out to be detrimental or unpopular." *Ibid.* But where Congress commandeers and forces States to implement federal policy, "it may be state officials who will bear the brunt of public disapproval, while

the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169.

Accordingly, this Court has stressed that maintaining clear lines of political accountability is the touchstone of the anti-commandeering doctrine. Although commandeering can be a way for Congress to save a few federal dollars, it does not matter whether the States must actually "absorb the costs of implementing a federal program." *Printz*, 521 U.S. at 930. Nor is the importance of the federal program, *New York*, 505 U.S. at 178, or a State's consent, *id.* at 182, relevant. The critical question is whether the federal government has put States "in the position of taking the blame for [the federal program's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930.

As this Court has noted, the focus on maintaining direct accountability "may appear 'formalistic'" but that is the nature of our Constitution, which places great emphasis on "the form of our government." *New York*, 505 U.S. at 187. Our system of dual sovereignty, requiring each government to remain accountable to its citizens, is as much a part of the Constitution as the substantive limits on Congress's power. And it is equally, if not more, significant. The separation of the state and federal governments "is one of the Constitution's structural protections of liberty," *Printz*, 521 U.S. at 921, providing an important "'double security'" against tyranny and the abuse of power, *id.* at 922 (quoting *The Federalist* No. 51, p. 320 (James Madison)). By keeping them strictly apart, "'[t]he

different governments will control each other, at the same time that each will be controlled by itself.'" *Ibid.*

b. The Third Circuit's "coercive binary choice" test fails to recognize that federal laws that prevent States from considering the full panoply of available policy choices—such as whether or not to issue a license—can result in precisely the sort of misplaced blame that the anti-commandeering doctrine aims to prevent. When a State denies an individual his driver's license, building permit, medical license, or fishing license, the individual is unlikely to blame Congress, which did not enact some form of direct national regulation. For the average American, who is not familiar with every nuance of the United States Code, the more obvious culprits are the state officials who stand between the citizen and the desired license.

This human propensity to "shoot the messenger" has long been recognized. Sophocles wrote in *Antigone* that "[n]o one likes the bringer of bad news." Sophocles, *Antigone* (c. 441 B.C.), *reprinted in* Sophocles: *The Complete Plays* 352 (Paul Roche transl., Signet Classics 2001). Shakespeare wrote in *Antony and Cleopatra* that "[t]he nature of bad news infects the teller." William Shakespeare, *Antony and Cleopatra* (c. 1606), *reprinted in The Unabridged William Shakespeare* 1135 (William George Clark & William Aldis Wright eds. 1989). English law historically protected town criers because of the people's tendency to lash out at these bearers of the King's news. Any harm to a town crier—shooting the messenger, so to speak—was considered treason. See

Top town crier to be crowned as Hebden Bridge hits 500, BBC, http://news.bbc.co.uk/local/bradford/hi/people_and_places/arts_and_culture/newsid_8931000/8931369.stm (last updated Aug. 20, 2010).

Importantly, this Court has shown that it does not matter, for purposes of the anti-commandeering doctrine, that a little research might reveal the federal government's involvement. In *Printz*, this Court found that Congress had improperly shifted political accountability to state chief law enforcement officers ("CLEOs") by requiring them to conduct background checks during handgun sales. The Court reasoned: "[I]t will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun." 521 U.S. at 930. Thus, "it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected." *Ibid.*

This blurring of the lines of political accountability between the state and federal governments will occur regardless of whether the federal commandeering reduces a State's option to two unpalatable choices or not. It will result as long as, in some cases, federal law requires States to retain and unforce unpopular policies against the States' will.

2. Prohibiting States From Repealing Their Own Laws Raises Particular Concerns Under The Tenth Amendment.

The Third Circuit's *en banc* decision raises

further federalism concerns because it would prohibit States from doing so much as repealing their own laws. In 2013, the Third Circuit purported to interpret PASPA to preserve state autonomy at least to the extent that a State would be permitted to "repeal[] its ban on sports wagering." Pet. App. 158a, 160a. While this test was similarly unmoored to this Court's anti-commandeering case law, it at least preserved some room for States to remove existing restrictions on private conduct. The *en banc* Third Circuit, however, further restricted the universe of permissible state action by holding that PASPA prohibited even the "selective repeal of certain prohibitions" under state law. See Pet. App. 23a.

Prohibiting States from repealing their own laws raises at least two additional troubling concerns from a federalism perspective.

1. The Third Circuit's decision conflicts with a core aspect of residual sovereignty guaranteed by the Tenth Amendment—namely, the right of the People to decide whether or not to retain certain powers and liberties or to delegate those powers and liberties to the States. Specifically, the Third Circuit's ruling would make it impossible for the People, acting through their state representatives, to reclaim liberties previously delegated to the States through the repeal of unpopular laws.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, *or to the people*." U.S. Const. amend. X (emphasis added). This Amendment does not exist merely to "protect the

sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States." *New York*, 505 U.S. at 181. Instead, "the Constitution divides authority between federal and state governments for the *protection of individuals*." *Ibid.* (emphasis added); see also *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

Inherent in the rights reserved under the Tenth Amendment is the right of the People to decide whether or not to permit States to regulate in certain areas or to retain such power for themselves. The Tenth Amendment "does not specify which of these two possibilities obtains." *Thornton*, 514 U.S. at 847 (Thomas, J., dissenting). Rather, "the Amendment avoids taking any position on the division of power between the state governments and the people of the States," and leaves "to the people of each State to determine which 'reserved' powers their state government may exercise." *Id.* at 848. In other words, it is up to the People of each State and their elected representatives (not Congress) to decide whether to enact or repeal legislation in an area within the State's reserved powers (and not contrary to a valid federal regulatory regime).

Accordingly, this Court has noted that a federal law should be read narrowly to preserve state authority "when Congress legislates in an area traditionally governed by the States' police powers." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188–89 (2014). It is beyond doubt that the rights and obligations attending sports wagering fall within

these reserved or "police powers" of the States. Indeed, because "[t]he suppression of gambling is concededly within the police powers of a state, . . . legislation prohibiting it, or acts which may tend to facilitate it, will not be interfered with by the court[s] unless such legislation [effects] a clear, unmistakable infringement of rights secured by the fundamental law." *Ah Sin v. Wittman*, 198 U.S. 500, 505–06 (1905) (internal quotation marks omitted). The purpose of these canons of construction is to protect the primacy of state power in areas that the Constitution has left to the States. See *ibid.*

The Third Circuit's decision turns this deferential approach on its head, by restricting the rights of the States' elected representatives to return power to the People by repealing existing laws. Rather, the Third Circuit's decision would allow Congress to cement in place prohibitions that citizens have voted to remove from their state constitutions or statutes.

New Jersey's experience provides a case in point about how (absent PASPA) a State's citizenry can exercise its residual sovereignty under the U.S. Constitution to return liberties to the People within the State. Although New Jersey law had previously prohibited sports wagering, the state legislature in 2010 sought out ways in which it could financially assist struggling casinos and racetracks within its borders. See Pet. App. 52a. After public hearings convinced state lawmakers that sports wagering might provide a necessary boost to New Jersey's gaming establishments, the New Jersey Legislature provided its citizenry, via a 2011 constitutional

referendum, the opportunity to decide for itself whether the economic benefits of sports gaming outweighed the perceived drawbacks. *Ibid.* Sixty-four percent of those who voted decided that allowing sports gaming would be in the State's best interest. *Ibid.* The people of New Jersey thus by a comfortable majority returned a particular liberty that had previously been proscribed by state law (sports wagering) back to the People.

These actions fit squarely within the rights and powers reserved to the States and the People under the Tenth Amendment in instances where, like here, there is no contrary federal regulatory regime. The Third Circuit's construction of PASPA and its unprecedented approach to federal preemption, however, shackles New Jersey's citizenry by freezing in time prohibitions that no longer make sense to state residents.

Moreover, there is no principled reason why the Third Circuit's approach would be limited in future cases to the unique concerns underlying PASPA. Rather, the Third Circuit's reasoning throws into confusion the extent to which any state electorate may control its lawmakers' exercise of the police powers that have, since the earliest days of the Republic, enjoyed freedom from federal interference. The slope is slippery: if allowed to stand, the Third Circuit's opinion could place at the mercy of the federal government state attempts to experiment with their respective—and often uniquely local—approaches to, *inter alia*, the days on which alcohol might be sold, hunting and fishing licenses, lotteries, and speed limits. Certiorari should be granted to

protect the traditional role of the States in our federal system.

2. Furthermore, by allowing the federal government to ossify sports-wagering restrictions that the People of a State desire to repeal, the Third Circuit has allowed the federal government to commandeer executive branch officials as well as the State's lawmakers. As New Jersey's petition for certiorari notes, Pet. 17, the state constitution leaves law-enforcement officials with no discretion to ignore gambling prohibitions that remain in effect. See, *e.g.*, N.J. Const. art. V, § 1, ¶ 11 ("The Governor shall take care that the laws be faithfully executed."). Thus, the Third Circuit's opinion forces state law-enforcement officers to prosecute violators of prohibitions that, had the People been permitted to exercise their constitutionally-recognized right to self-governance, would not exist.

This Court has noted that federal commandeering of state executive-branch officials violates the Constitution as much as commandeering of legislative-branch officials. As the Court has observed, "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the . . . States." *Printz*, 521 U.S. at 922. The Court has also recognized that allowing Congress to commandeer state executive-branch officials would violate separation of powers principles. By allowing Congress to *de facto* order *state* executive branch officials to enforce *state* prohibitions in furtherance of a *federal* legislative anti-sports-gaming objective, the Third Circuit has

given Congress license to "act as effectively without the President as with him," *id.* at 923. This, in turn, has the deleterious effect of "shatter[ing]" federal "unity" and "reduc[ing]" the power of the Presidency. *Ibid.*

In short, "[t]he Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict." *Id.* at 919 (citing The Federalist No. 15). Thus, "the Federal Government may not compel the States to implement, by legislation *or executive action*, federal regulatory programs." *Id.* at 925 (emphasis added). Because the Third Circuit's reading of PASPA would require state executive officials to enforce unpopular laws that would otherwise be repealed, the court's analysis is fundamentally flawed and merits this Court's review.

II. THE THIRD CIRCUIT'S DECISION HARMS STATES AND OUR SYSTEM OF DUAL SOVEREIGNTY.

If permitted to stand, the Third Circuit's decision also threatens to greatly expand the federal government's power. Significantly, with the ability to shift political blame to the States, Congress could act with far less fear of repercussions at the voting booth, especially on issues that strike at the core of American life and for which the federal government would very likely want to avoid responsibility.

For instance, with the recent controversy over long-term brain damage in football players, Congress

could decide that American children should not be playing the sport. But rather than enact what could be extremely unpopular restrictions at the national level, the federal government could prohibit the States from authorizing or licensing youth football leagues. In the interest of national security, Congress might decide that the Department of Justice requires greater ability to monitor the Internet. But to deflect the backlash for its invasion of privacy, federal legislators could restrict the States from issuing business licenses to Internet service providers unless those companies agreed to provide the FBI unrestrained access to their subscriber databases.

In such cases, when the permit or license is denied, at least some (if not all) of the blame will fall wrongly on the States, even if a particular State would prefer as a matter of policy to have acted otherwise. Just as in *Printz*, it will be the State, or a state official, and "not some federal official" who is interfering with day-to-day life, 521 U.S. at 930. And just as in *Printz*, there would be legitimate concerns about misplaced blame even though these are high-profile issues and the relevant laws would be available to anyone diligent enough to seek them out and read them.

The injury to state sovereignty would be unprecedented. The genius of our system of dual sovereignty is that the States can act as a voice for change or dissent, even in the face of a national policy. Our system of government "promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose,

serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). If Congress disagrees and has the Article I authority to act, it may establish a federal regime and preempt contrary state law. And when Congress does so, it is understood that the federal government has simply overridden the States and that individual States do not necessarily agree with the national policy. But under the Third Circuit's view, Congress could avoid taking ownership and force the States to advance its preferred policy position, whatever that may be under the political party then in power, in a way that makes individual States seem responsible. Our federal system of government does not permit this result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SUPREME COURT, U.S.

Nos. 16-476 & 16-477

IN THE
Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Respondents.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
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On Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

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General Docket
Third Circuit Court of Appeals

Court of Appeals Docket #:	**Docketed:**
14-4546	12/05/2014
Nature of Suit:	**Termed:**
3890 Other Statutory Actions NCAA, et al v. Governor of New Jersey, et al	08/09/2016
Appeal From: United States District Court for the District of New Jersey	
Fee Status: Paid	

Case Type Information:

1) civil
2) private
3) Federal question

Originating Court Information:

District: 0312-3 : 3-14-cv-06450

Trial Judge: Michael A. Shipp, U.S. District Judge

Date Filed: 10/20/2014

Date Order/ Judgment:	**Date Order/ Judgment EOD:**	**Date NOA Filed:**
11/21/2014	11/21/2014	11/24/2014

Prior Cases:	**Lead**	**Member**	**Start**	**End**
None	14-4546 14-4568	14-4546 14-4569	12/08/ 2014	

Current Cases: Consolidated			12/08/2014	

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission; NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; NEW JERSEY SPORTS & EXPOSITION AUTHORITY

STEPHEN M. SWEENEY, President of the New Jersey Senate; VINCENT PRIETO, Speaker of the New Jersey General Assembly (Intervenors in District Court)

Governor of New Jersey; David L. Rebuck; Frank Zanzuccki,

Appellants

12/05/ 2014	☐ 42 pg, 461.86 KB	CIVIL CASE DOCKETED. Notice filed by Appellants Governor of New Jersey, David L. Rebuck and Frank Zanzuccki in District Court No. 3-14-cv-06450. (TMM)
		* * *
12/08/ 2014	☐ 2 pg, 76.29 KB	ORDER (Clerk) The appeals at Nos. 14-4546, 14-4568, and 14-4569 are hereby consolidated for purposes of scheduling, joint appendix, and disposition, filed. (See Attached Order) [14-4546, 14-4568, 14-4569] (TMM)
		* * *
01/14/ 2015	☐ 64 pg, 278.84 KB	ECF FILER: ELECTRONIC BRIEF on behalf of Appellants Governor of New Jersey, David L. Rebuck and Frank Zanzuccki in 14-4546, filed. Certificate of Service dated 01/14/2015 by ECF.-- [Edited 01/16/2015 by MCW] (ADN)

01/14/2015	☐ 736 pg, 41.34 MB	ECF FILER: ELECTRONIC JOINT APPENDIX on behalf of Appellants Governor of New Jersey, David L. Rebuck and Frank Zanzuccki in 14-4546, Appellants Vincent Prieto and Stephen M. Sweeney in 14-4568, Appellant New Jersey Thoroughbred Horsemens Association Inc in 14-4569, filed. Certificate of service dated 01/14/2015 by ECF. [14-4546, 14-4568, 14-4569] (ADN) * * *
02/06/2015	☐ 23 pg, 108.42 KB	ECF FILER: ELECTRONIC AMICUS/INTERVENOR BRIEF on behalf of United States of America in support of Appellee/Respondent, filed. Certificate of Service dated 02/06/2015 by ECF. F.R.A.P. 29(a) Permission: YES. [14-4546, 14-4568, 14-4569] (PJP) * * *
02/13/2015	☐ 60 pg, 155.88 KB	ECF FILER: ELECTRONIC BRIEF on behalf of Appellees NBA, NHL, NCAA, National Football League and Office of the Commissioner of Baseball in 14-4546, 14-4568, 14-4569, filed. Certificate of Service dated 02/13/2015 by ECF. [14-4546, 14-4568, 14-4569] (PDC) * * *

02/27/2015	☐ 37 pg, 205.55 KB	ECF FILER: ELECTRONIC REPLY BRIEF on behalf of Appellants Governor of New Jersey, David L. Rebuck and Frank Zanzuccki, filed. Certificate of Service dated 02/27/2015 by ECF. (ADN) * * *
03/17/2015	☐	ARGUED on Tuesday, March 17, 2015. Panel: RENDELL, FUENTES and BARRY, Circuit Judges. Paul D. Clement arguing for Appellees NBA, NHL, National Collegiate Athletic Association, National Football League; Michael R. Griffinger arguing for Appellant Vincent Prieto, Stephen Sweeney; Theodore B. Olson arguing for Appellant Governor of New Jersey, David L. Rebuck, Frank Zanzuccki; Peter J. Phipps arguing for Amicus Appellee United States of America; Ronald J. Riccio arguing for Appellee New Jersey Thoroughbred Horsemens Association Inc. [14-4546, 14-4568, 14-4569] (CMH) * * *
03/30/2015	☐ 72 pg, 169.62 KB	ECF FILER: Transcript of oral argument on 03/30/2015 prepared at the direction of the Court. [14-4546, 14-4568, 14-4569] (AEJ) * * *

08/25/2015	☐ 31 pg, 424.15 KB	PRECEDENTIAL OPINION Coram: RENDELL, FUENTES and BARRY, Circuit Judges. Total Pages: 31. Judge: RENDELL Authoring, Judge: FUENTES Dissenting. [14-4546, 14-4568, 14-4569] (VACATED PER COURT'S ORDER OF 10/14/15)--[Edited 10/14/2015 by TMM] (TMM)
08/25/2015	☐ 7 pg, 112.81 KB	JUDGMENT, ORDERED and ADJUDGED by this Court that the order of the District Court dated November 21, 2014 is hereby Affirmed. [14-4546, 14-4568, 14-4569] (VACATED PER COURT'S ORDER OF 10/14/15)--[Edited 10/14/2015 by TMM] (TMM)
09/08/2015	☐ 56 pg, 767.46 KB	ECF FILER: Petition filed by Appellants Governor of New Jersey, David L. Rebuck and Frank Zanzuccki for Rehearing before original panel and the court en banc. Certificate of Service dated 09/08/2015. (AEJ)

09/15/2015	☐ 2 pg, 78.91 KB	ORDER (MCKEE, Chief Judge, AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, KRAUSE, RENDELL and BARRY, Circuit Judges) The Appellees are directed to file an answer to the petitions for rehearing within 14 days from the date of this order. The answer shall not exceed 15 pages, filed. Rendell, Authoring Judge. [14-4546, 14-4568, 14-4569]--[Edited 10/06/2015 by TMM] (TMM)
09/29/2015	☐ 20 pg, 69.73 KB	ECF FILER: Response filed by Appellees NBA, NHL, NCAA, National Football League and Office of the Commissioner of Baseball in 14-4546, 14-4568, 14-4569 to Petition En Banc Rehearing, Petition for Panel Rehearing. Certificate of Service dated 09/29/2015. [14-4546, 14-4568, 14-4569] (PDC)
10/05/2015	☐ 25 pg, 367.22 KB	ECF FILER: JOINT Motion filed by Appellants Governor of New Jersey, David L. Rebuck and Frank Zanzuccki for Leave to File Reply in Support of Petition for Rehearing with attached Reply. Certificate of Service dated 10/05/2015. [14-4546, 14-4568, 14-4569]--[Edited 10/07/2015 by TMM] (JSJ)

10/14/2015	☐ 2 pg, 82.41 KB	ORDER (AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, KRAUSE, RENDELL and BARRY, Circuit Judges) Joint Motion by Appellants for Leave to File Reply in Support of Petition for Rehearing is granted, filed. Rendell, Authoring Judge. [14-4546, 14-4568, 14-4569]--[Edited 10/14/2015 by TMM] (TMM)

10/14/2015	☐ 2 pg, 11.03 KB	ORDER filed (Coram: AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY JR., VANASKIE, KRAUSE, RENDELL* and BARRY*, Circuit Judges) A majority of the active judges having voted for rehearing en banc, it is ordered that the petitions for rehearing are GRANTED. The Clerk of the Court shall list the case for rehearing en ban at the convenience of the Court. The opinion and judgment entered August 25, 2015 are hereby vacated. Authoring Judge: Rendell. *The Honorable Marjorie O. Rendell and Honorable Maryanne Trump Barry will participate as members of the en banc court pursuant to 3d. Cir. I.O.P. 9.6.4. [14-4546, 14-4568, 14-4569] (TMM) * * *

02/12/2016	☐ 2 pg, 80.65 KB	ORDER (AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY JR., VANASKIE, KRAUSE, RESTREPO, RENDELL and BARRY, Circuit Judges) granting Motion filed by Amicus Appellee USA for leave to participate in oral argument. The United States shall have the 10 minutes of argument time, filed. Thomas L. Ambro, Authoring Judge. [14-4546, 14-4568, 14-4569] (CMH)

02/17/ 2016	ARGUED on Wednesday, February 17, 2016. Panel: AMBRO, FUENTES, *SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY JR., VANASKIE, KRAUSE, RESTREPO, RENDELL, **BARRY, Circuit Judges. Paul D. Clement arguing for Appellees NBA, NHL, National Collegiate Athletic Association, National Football League; Paul J. Fishman arguing for Amicus Appellee United States of America; Theodore B. Olson arguing for Appellant Governor of New Jersey, David L. Rebuck; Ronald J. Riccio arguing for Appellant/Appellee New Jersey Thoroughbred Horsemens Association Inc, Circuit Judges. [14-4546, 14-4568, 14-4569] *Honorable D. Brooks Smith participated by video conference. **Honorable Maryanne T. Barry participated via audio conference. (CMH)

08/09/2016	☐ 51 pg, 597.2 KB	PRECEDENTIAL OPINION Coram: AMBRO, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY JR., VANASKIE, KRAUSE, RESTREPO, RENDELL and BARRY, Circuit Judges. Total Pages: 51. Judge: RENDELL Authoring, Judge: FUENTES Dissenting, Judge: VANASKIE Dissenting. [14-4546, 14-4568, 14-4569] (TMM)
08/09/2016	☐ 7 pg, 122.78 KB	JUDGMENT, ORDERED and ADJUDGED by this Court that the order of the District Court dated November 21, 2014 is hereby Affirmed. [14-4546, 14-4568, 14-4569] (TMM)
08/11/2016	☐ 2 pg, 17.17 KB	ORDER AMENDING OPINION (Clerk) The opinion issued on August 9, 2016 is hereby amended as the Honorable L. Felipe Restepo joined in the dissenting opinion filed by the Honorable Julio M. Fuentes. A revised opinion will be entered on the docket reflecting the change. This amendment does not affect the original filing date of the judgment. [14-4546, 14-4568, 14-4569] (TMM)

08/11/2016	☐ 51 pg, 268.7 KB	AMENDED PRECEDENTIAL OPINION Coram: AMBRO, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY JR., VANASKIE, KRAUSE, RESTREPO, RENDELL and BARRY, Circuit Judges. Total Pages: 51. Judge: RENDELL Authoring, Judge: FUENTES joined by RESTREPO Dissenting, Judge: VANASKIE Dissenting. [14-4546, 14-4568, 14-4569] (TMM)
08/31/2016	☐ 55 pg, 410.27 KB	MANDATE ISSUED, filed. [14-4546, 14-4568, 14-4569] (TMM) * * *
06/27/2017	☐	NOTICE of U.S. Supreme Court disposition at No. 16-476. Petition for Writ of Ceriorari filed by Governor of New Jersey granted on 06/27/2017. The cases are consolidated and a total of one hour is allotted for oral argument. [14-4546, 14-4568, 14-4569] --[Edited 06/27/2017 by AWI] (AWI)

06/27/ 2017	☐	NOTICE of U.S. Supreme Court disposition at No. 16-477. Petition for Writ of Ceriorari filed by New Jersey Thoroughbred Horsemens Association Inc granted on 06/27/2017. The cases are consolidated and a total of one hour is allotted for oral argument. [14-4546, 14-4568, 14-4569] (AWI)

U.S. District Court
District of New Jersey [LIVE] (Trenton)
CIVIL DOCKET FOR
CASE #: 3:14-cv-06450-MAS-LHG

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION et al v. CHRISTIE et al

Assigned to:
Judge Michael A. Shipp

Referred to: Magistrate Judge Lois H. Goodman

Case in other court:
3rd circuit, 14-04546
3rd circuit, 14-04568
3rd circuit, 14-04569

Cause:
28:1331 Federal Question-Injunctive & Declaratory Relief

Date Filed: 10/20/2014

Date Terminated: 01/15/2016

Jury Demand:
None

Nature of Suit:
890 Other Statutory Actions

Jurisdiction: Federal Question

Plaintiff

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

an unincorporated association

represented by

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V.

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Defendant

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Speaker of the New Jersey General Assembly

represented by

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ATTORNEY TO BE NOTICED

Interested Party

UNITED STATES OF AMERICA

represented by

PETER JOSEPH PHIPPS

U.S. DEPARTMENT OF JUSTICE

CIVIL DIVISION

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Date Filed	#	Docket Text
10/20/2014	1	COMPLAINT against CHRISTOPHER J. CHRISTIE, NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC., DAVID L. REBUCK, and FRANK ZANZUCCKI (Filing and Admin fee $ 400 receipt number 5997764), filed by NATIONAL HOCKEY LEAGUE, NATIONAL BASKETBALL ASSOCIATION, OFFICE OF THE COMMISSIONER OF BASEBALL, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, and NATIONAL FOOTBALL LEAGUE. (Attachments: # 1 Civil Cover Sheet)(mak)(Entered: 10/20/2014) * * *
10/21/2014	12	MOTION for Order to Show Cause *with Temporary Restraints* by NATIONAL BASKETBALL ASSOCIATION, NATIONAL COLLEGIATE ATHLETIC

		ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL. (Attachments: # 1 Cover Letter Filing by Hand, # 2 Brief in Support of Applications for a Temporary Restraining Order, Preliminary Injunction and to Enforce the Permanent Injunction Issued in 12-CV-04947, # 3 Declaration of Anthony J. Dreyer with Exhibits 1 through 20 attached, # 4 Exhibit 1, # 5 Exhibit 2, # 6 Exhibit 3, # 7 Exhibit 4, # 8 Exhibit 5, # 9 Exhibit 6, # 10 Exhibit 7, # 11 Exhibit 8, # 12 Exhibit 9, # 13 Exhibit 10, # 14 Exhibit 11, # 15 Exhibit 12, # 16 Exhibit 13, # 17 Exhibit 14, # 18 Exhibit 15, # 19 Exhibit 16, # 20 Exhibit 17, # 21 Exhibit 18, # 22 Exhibit 19, # 23 Exhibit 20, # 24 Text of Proposed Order for a Preliminary Injunction)(HERNANDEZ, RICHARD) (Entered: 10/21/2014) * * *
10/22/2014	19	BRIEF in Opposition filed by NEW JERSEY SPORTS AND EXPOSITION AUTHORITY re 12 MOTION for Order to Show Cause *with Temporary Restraints* (Attachments: # 1 Declaration of Ralph J. Marra, # 2 Certification Pursuant to Local Civil Rule 11.2, # 3 Certificate of Service)(TORCICOLLO, PETER) (Entered: 10/22/2014)

		* * *
10/22/2014	21	BRIEF in Opposition filed by NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC. re 12 MOTION for Order to Show Cause *with Temporary Restraints* (Attachments: # 1 Certification of Ronald J. Riccio, Esq., # 2 Exhibit A to R. Riccio Certification, # 3 Exhibit B to R. Riccio Certification, # 4 Exhibit C to R. Riccio Certification, # 5 Exhibit D to R. Riccio Certification, # 6 Exhibit E to R. Riccio Certification, # 7 Exhibit F to R. Riccio Certification, # 8 Exhibit G to R. Riccio Certification, # 9 Certification of Michael Musto with Exhibits A and B, # 10 Certification of Robert J. Kulina, # 11 Certification of Dennis A. Drazin with Exhibit A, # 12 Certificate of Service) (RICCIO, RONALD) (Entered: 10/22/2014)
10/22/2014	22	MEMORANDUM in Opposition filed by CHRISTOPHER J. CHRISTIE, DAVID L. REBUCK, FRANK ZANZUCCKI re 12 MOTION for Order to Show Cause *with Temporary Restraints* (Attachments: # 1 Certificate of Service)(JACOBSON, JEFFREY) (Entered: 10/22/2014) * * *
10/23/2014	26	REPLY BRIEF to Opposition to Motion

		filed by NATIONAL BASKETBALL ASSOCIATION, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL re 12 MOTION for Order to Show Cause with Temporary Restraints (Attachments: # 1 Cover Letter)(O'SHAUGHNESSY, WILLIAM) (Entered: 10/23/2014) * * *
10/24/2014	31	Minute Entry for proceedings held before Judge Michael A. Shipp: Motion Hearing via telephone held on 10/24/2014 re 12 MOTION for Order to Show Cause *with Temporary Restraints* filed by NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL. Decision on Plaintiffs' motion read into the record. Plaintiffs' motion is granted. Order to be entered. (Court Reporter-CATHY FORD.) (NR) (Entered: 10/24/2014)
10/24/2014	32	ORDER granting 12 Motion for Order to Show Cause. Signed by Judge Michael A. Shipp on 10/24/14. (NR) (Entered: 10/24/2014)

		* * *
10/24/2014	34	TEXT ORDER: The Court has provided an addendum to its oral decision, entered on the record on October 24, 2014, which will be reflected in the transcript of the decision. The scope of the temporary restraints is set forth in the Court's Order (Doc. No. 32). So ordered by Judge Michael A. Shipp on 10/24/2014. (FH) (Entered: 10/24/2014)
10/27/2014	35	Letter from Anthony J. Dreyer re 33 Scheduling Order. (DREYER, ANTHONY) (Entered: 10/27/2014)
10/27/2014	36	Letter from Ronald J. Riccio, Esq. re 32 Order on Motion for Order to Show Cause. (Attachments: # 1 Text of Proposed Order)(RICCIO, RONALD) (Entered: 10/27/2014)
10/27/2014	37	Letter from Anthony J. Dreyer re 36 Letter. (DREYER, ANTHONY) (Entered: 10/27/2014)
10/28/2014	38	SCHEDULING ORDER: Defendants may file additional briefing in opposition to Plaintiffs' pending application for a preliminary injunction by 11/3/2014; Plaintiffs may file a reply brief by 11/7/2014; Oral Argument is set for 11/20/2014 at 10:00 AM; that the 14-day limitation period on the TRO is extended for an additional 14 days; that the NJTHA's request for an increase in security due to the 14 day extension is

		granted; Plaintiffs must post an additional $1,700,000 bond by 11/10/2014. Signed by Judge Michael A. Shipp on 10/27/2014. (jjc) (Entered: 10/28/2014) * * *
10/30/2014	41	Transcript of Motion Hearing held on 10/24/2014, before Judge MICHAEL A. SHIPP. Court Reporter/Transcriber Cathy Ford (609-367-2777). **NOTICE REGARDING REDACTION OF TRANSCRIPTS:** The parties have seven (7) calendar days to file with the Court a Notice of Intent to Request Redaction of this Transcript. Redaction Request due 11/20/2014. Redacted Transcript Deadline set for 12/1/2014. Release of Transcript Restriction set for 1/28/2015. (eaj) (Entered: 10/30/2014)
11/03/2014	42	BRIEF *in Opposition to Plaintiffs' Application for a Preliminary Injunction* (Attachments: # 1 Certification of Ronald J. Riccio, Esq. with Exhibit A, # 2 Certificate of Service)(RICCIO, RONALD) (Entered: 11/03/2014)
11/03/2014	43	BRIEF *in Opposition to Plaintiffs' Application for a Preliminary Injunction* (Attachments: # 1 Declaration of Ralph J. Marra, # 2 Exhibit A, # 3 Certificate of Service)(TORCICOLLO, PETER) (Entered: 11/03/2014)

11/03/2014	44	BRIEF *in Opposition to Plaintiffs' Motion for a Preliminary Injunction* (Attachments: # 1 Declaration David Rebuck, # 2 Declaration Frank Zanzuccki, # 3 Declaration Matthew Levinson, # 4 Certificate of Service)(JACOBSON, JEFFREY) (Entered: 11/03/2014) * * *
11/06/2014	46	Letter from Thomas R. Valen, Esq. to Honorable Michael A. Shipp, U.S.D.J., requesting leave to intervene on behalf of Presiding Officers of the New Jersey Legislature. (Attachments: # 1 Text of Proposed Order, # 2 Certificate of Service)(VALEN, THOMAS) (Entered: 11/06/2014) * * *
11/07/2014	48	ORDER that The Legislature Defendants' application for leave to intervene is hereby GRANTED; that The Legislature Defendants shall be entered by the Clerk of the Court as Defendants. Signed by Judge Michael A. Shipp on 11/7/2014. (jjc) (Entered: 11/07/2014)
11/07/2014	49	BRIEF *(Reply) in Further Support of Plaintiffs' Motion for a Preliminary Injunction* (Attachments: # 1 Declaration (Supplemental) of Anthony J. Dreyer, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7)(O'SHAUGHNESSY, WILLIAM) (Entered:

		11/07/2014)
11/10/2014	50	TEXT ORDER: All parties are on notice that the Court intends to consolidate the application for a preliminary injunction with a decision on the merits. The parties shall e-file correspondence with the Court by Monday, November 17, 2014, if there are any additional considerations or issues in connection with such consolidation. SO ORDERED by Judge Michael A. Shipp on 11/10/14. (FH) (Entered: 11/10/2014)
11/17/2014	51	Letter from Plaintiffs re 50 Order,. (HERNANDEZ, RICHARD) (Entered: 11/17/2014)
11/17/2014	52	Letter from Jeffrey Jacobson re 50 Order,. (Attachments: # 1 Statement of Undisputed Material Facts)(JACOBSON, JEFFREY) (Entered: 11/17/2014)
11/17/2014	53	Letter from Ronald J. Riccio re 50 Order,. (Attachments: # 1 Certification of Ronald J. Riccio, # 2 Exhibit A to Riccio Cert., # 3 Exhibit B to Riccio Cert., # 4 Exhibit C to Riccio Cert., # 5 Exhibit D to Riccio Cert., # 6 Exhibit E to Riccio Cert.)(RICCIO, RONALD) (Entered: 11/17/2014)
11/17/2014	54	Letter from Thomas R. Valen, Esq. to Honorable Michael A. Shipp re: docket entry 50. (VALEN, THOMAS) (Entered: 11/17/2014)

		* * *
11/19/2014	56	TEXT ORDER - After careful consideration of the correspondence submitted to the Court by all parties, and in clarification of the Court's November 10, 2014 Text Oder (Doc. No. 50), the Court shall consolidate Plaintiff's application for a preliminary injunction with a decision on the merits through summary judgment. ORDERED by Judge Michael A. Shipp on 11/19/14. (NR) (Entered: 11/19/2014)
11/19/2014	57	STATEMENT *OF INTEREST* by UNITED STATES OF AMERICA. (Attachments: # 1 Certificate of Service)(PHIPPS, PETER) (Entered: 11/19/2014)
11/19/2014	58	STATEMENT *Plaintiffs' Response to State Defendants' Statement of Material Facts and Counterstatement of Undisputed Material Facts* by NATIONAL BASKETBALL ASSOCIATION, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL. (HERNANDEZ, RICHARD) (Entered: 11/19/2014) * * *
11/19/2014	60	STATEMENT *OF UNDISPUTED MATERIAL FACTS PURSUANT TO LOCAL RULE 56.1* by NEW JERSEY

		SPORTS AND EXPOSITION AUTHORITY. (TORCICOLLO, PETER) (Entered: 11/19/2014)
11/20/2014	61	Letter from Ronald J. Riccio, Esq. re 56 Order,. (RICCIO, RONALD) (Entered: 11/20/2014)
11/20/2014	62	RESPONSE re 59 Response (NOT Motion). (Attachments: # 1 Certificate of Service)(JACOBSON, JEFFREY) (Entered: 11/20/2014)
11/20/2014	63	Minute Entry for proceedings held before Judge Michael A. Shipp: Hearing on Plaintiff's Application for Preliminary Injunction held on 11/20/2014 re 12 MOTION for Order to Show Cause *with Temporary Restraints* filed by NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONEROF BASEBALL. Decision Reserved. Order to be entered. (Court Reporter- CATHY FORD.) (NR) Modified on 12/3/2014 (NR). (Main Document 63 replaced on 12/3/2014) (NR). (Entered: 11/21/2014)
11/21/2014	64	OPINION. Signed by Judge Michael A. Shipp on 11/21/2014. (FH) (Entered: 11/21/2014)
11/21/2014	65	ORDER. Signed by Judge Michael A. Shipp on 11/21/2014. (FH) (Entered: 11/21/2014)

11/21/2014	66	NOTICE OF APPEAL as to 64 Opinion, 65 Order by CHR STOPHER J. CHRISTIE, DAVID L. REBUCK, FRANK ZANZUCCKI. Filing fee $ 505, receipt number 0312-6065031. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (Attachments: # 1 Certificate of Service)(JACOBSON, JEFFREY) (Entered: 11/21/2014)
11/24/2014	67	NOTICE OF APPEAL as to 64 Opinion, 65 Order by VINCENT PRIETO, STEPHEN M. SWEENEY. Filing fee $ 505, receipt number 0312-6066811. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (Attachments: # 1 Certificate of Service)(GRIFFINGER, MICHAEL) (Entered: 11/24/2014)
11/24/2014	68	NOTICE OF APPEAL as to 64 Opinion, 65 Order by NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.. Filing fee $ 505, receipt number 0312-6066928. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (Attachments: # 1 Certificate of Service)(RICCIO, RONALD) (Entered:

		11/24/2014)
11/24/2014	69	Letter from Anthony J. Dreyer re 47 Bond,. (DREYER, ANTHONY) (Entered: 11/24/2014)
11/25/2014	70	Letter from Ronald J. Riccio re 69 Letter. (RICCIO, RONALD) (Entered: 11/25/2014) * * *
12/01/2014	71	Transcript of Motion for Preliminary Injunction held on 11/20/2014, before Judge MICHAEL A. SHIPP. Court Reporter/Transcriber Cathy Ford (609-367-2777). **NOTICE REGARDING REDACTION OF TRANSCRIPTS:** The parties have seven (7) calendar days to file with the Court a Notice of Intent to Request Redaction of this Transcript. Redaction Request due 12/22/2014. Redacted Transcript Deadline set for 1/5/2015. Release of Transcript Restriction set for 3/2/2015. (eaj) (Entered: 12/01/2014)
12/02/2014	72	TEXT ORDER - After careful consideration of the parties' correspondence (ECF Nos. 69, 70), Plaintiffs' request that the Court order the bond discharged is DENIED. So Ordered by Judge Michael A. Shipp on 12/2/14. (NR) (Entered: 12/02/2014) * * *

08/25 /2015	76	USCA JUDGMENT ORDERED and ADJUDGED by this Court that the order of the District Court dated November 21, 2014 is hereby Affirmed. Mandate will follow. (Entered: 08/25/2015)
01/15 /2016		***Civil Case Terminated, per chambers. (dm) (Entered: 01/15/2016)
08/31 /2016	77	MANDATE of USCA issued. (Attachments: # 1 mandate letter, # 2 opinion) (Entered: 08/31/2016)
09/01 /2016		Pursuant to the 77 MANDATE of the USCA, the Order of the USDC entered 11/21/2014 is AFFIRMED. (mmh) (Entered: 09/01/2016)

* * *

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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, NATIONAL BASKETBALL ASSOCIATION, a joint venture, NATIONAL FOOTBALL LEAGUE, an unincorporated association, NATIONAL HOCKEY LEAGUE, an unincorporated association, and OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball, Plaintiffs,	**UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY** Civil Action No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

v.

CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission, NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC., and NEW JERSEY SPORTS AND EXPOSITION AUTHORITY,

Defendants.

Plaintiffs National Collegiate Athletic Association (the "NCAA"), National Basketball Association (the "NBA"), National Football League (the "NFL"), National Hockey League (the "NHL"), and Office of the Commissioner of Baseball doing business as Major League Baseball ("MLB"), by and through their undersigned counsel for their complaint allege as follows:

Nature of the Action

1. This action challenges New Jersey's latest effort—in defiance of this Court's February 28, 2013 Order and in clear and flagrant violation of federal law—to accomplish what it unsuccessfully attempted to do nearly three years ago: sponsor, operate, advertise, promote, license, or authorize gambling on amateur and professional sports at state-licensed casinos and horse racetracks. Because this effort is no more lawful than New Jersey's past ones, it, too, should be enjoined.

2. The federal Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701, *et seq.* ("PASPA"), with limited exceptions not applicable here, makes it unlawful for any "governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" any "lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or

are intended to participate, or on one or more performances of such athletes in such games." (28 U.S.C. § 3702.)

3. For years, New Jersey has been attempting to devise a way to get around these unambiguous prohibitions and authorize sports gambling in Atlantic City casinos and horse racetracks throughout the state.

a. New Jersey's efforts began in 2012, when it enacted the New Jersey Sports Wagering Law, N.J. Stat. 5:12A-1, *et seq.* (the "2012 Sports Wagering Law"), an open and acknowledged effort to authorize sports gambling in Atlantic City casinos and at New Jersey racetracks. Plaintiffs successfully challenged that statute as a violation of PASPA and, on February 28, 2013, this Court permanently enjoined Governor Christie and defendants David L. Rebuck, director of the New Jersey Division of Gaming Enforcement and assistant attorney general of the State of New Jersey, and Frank Zanzuccki, executive director of the New Jersey Racing Commission, from implementing or enforcing it. (*National Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551, 577-79 (D.N.J.), *aff'd*, 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014).)

b. On June 26, 2014, three days after the United States Supreme Court denied defendants' petition for certiorari in the *Christie* matter, the New Jersey legislature passed Senate Bill 2250 ("S2250"), legislation that purported to "repeal" the state's prohibitions on sports gambling, but to do so only at casinos and racetracks, which already are required to ob-

tain a license to offer any form of gambling and to comply with scores of rules and regulations to maintain that license. Governor Christie vetoed that legislation as a transparent attempt to circumvent this Court's injunction in *Christie* and PASPA's prohibitions.

c. On September 8, 2014, Governor Christie, through the state's acting attorney general, issued a directive positing that, notwithstanding the unambiguous terms of this Court's injunction, the operative provisions of the 2012 Sports Wagering Law—which provided that the casinos and racetracks "may operate a sports pool"—remained effective as a "repeal" of previous statutes prohibiting sports wagering, rather than an "authorization" of sports gambling. Only after declaring the directive effective immediately did the governor ask this Court to clarify and/or modify the *Christie* injunction to conform to this dubious theory.

4. On October 17, 2014, before this Court could consider the State's last attempt to circumvent the *Christie* injunction, Governor Christie signed into law Senate Bill S2460 (the "2014 Sports Wagering Law"), which repealed the 2012 Sports Wagering Law in its entirety and replaced it with yet another attempt to authorize sports wagering in Atlantic City casinos and horse racetracks throughout the state.

5. While styled as a "repeal," the 2014 Sports Wagering Law is nothing more than a de facto authorization of sports gambling. Like its vetoed predecessor, the 2014 Sports Wagering Law "repeals" all existing prohibitions, rules, and regulations that are specific to sports wagering, but does so *only* at Atlantic City casinos and horse racetracks throughout the

state—in other words, only at venues that are already state-licensed and regulated.

6. The bill's own sponsors have readily conceded that the 2014 Sports Wagering Law is intended to authorize and promote sports betting at casinos and racetracks. As Assemblyman Ralph Caputo explained: "We want to give the racetracks a shot in the arm. We want to help Atlantic City. We want to do something for the gaming business in the state of New Jersey." Senator Raymond J. Lesniak—perhaps the most ardent and unrelenting proponent of authorized sports betting in New Jersey—similarly told reporters that "Sports betting will be a lifeline to the casinos, putting people to work and generating economic activity in a growth industry."

7. The conclusion that the 2014 Sports Wagering Law is an authorization, rather than the repeal that it purports to be, also is compelled by the New Jersey Constitution. Gambling in New Jersey has been legalized very cautiously, and no gambling may be conducted in the state unless it is permitted by the state's Constitution. And no gambling is permitted under the state's Constitution unless it has been "authorized" by the Legislature and regulations established. (N.J. Const. art. IV, § VII, ¶ 2; *In the Matter of Petition of Casino Licensees*, 268 N.J. Super. 469, 472 (App. Div.), *aff'd*, 138 N.J. 1 (1993).)

8. Moreover, no gambling may be conducted in Atlantic City casinos unless that gambling has been specifically authorized by law. Article IV, Section VII of the New Jersey Constitution unequivocally provides:

> It shall be lawful for the Legislature to authorize by law the establishment and operation, under regulation and control of the State, of gambling houses or casinos within the boundaries, as heretofore established, of the city of Atlantic City, county of Atlantic, and to license and tax such operations and equipment used in connection therewith. . . . The type and number of such casinos or gambling houses and of the gambling games which may be conducted in any such establishment shall be determined by or pursuant to the terms of the law authorizing the establishment and operation thereof.

(N.J. Const. art. IV, § VII, ¶ 2D.) Thus, under the clear provisions of the New Jersey Constitution, the Legislature and the governor are powerless to permit any form of gambling in Atlantic City casinos unless the games are specifically authorized by law.

9. As all of the foregoing confirms, the State's latest attempt to authorize sports gambling is just as unlawful as its previous attempts. As the bill's practical operation reveals, its sponsors concede, and the New Jersey Constitution demands, the 2014 Sports Wagering Law is a blatant effort to authorize sports gambling at venues that are licensed and regulated by the state. It therefore violates both PASPA and this Court's injunction, which prohibits the governor and other state officials from "sponsoring, operating, advertising, promoting, licensing, or authorizing a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through

the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." (*Christie*, 926 F. Supp. 2d at 577-79.)

10. Alternatively, if the 2014 Sports Wagering Law really is nothing more than the repeal that it purports to be, then it violates the New Jersey Constitution, which requires any gambling to be specifically *authorized* by the Legislature.

11. At least one New Jersey racetrack, Monmouth Park Racetrack, a facility operated by defendant New Jersey Thoroughbred Horsemen's Association but owned by defendant New Jersey Sports and Exposition Authority—which, to make matters worse, is a state entity independently prohibited by PASPA from sponsoring, operating, advertising, or promoting sports gambling—has stated its intention to start offering sports gambling pursuant to the 2014 Sports Wagering Law as early as October 26, 2014.

12. As this Court already has held, the spread of state-sponsored sports gambling in New Jersey would irreparably harm plaintiffs. (*Christie*, 926 F. Supp. 2d at 578.) Indeed, this Court and Third Circuit have recognized that the spread of state-sponsored sports gambling "would engender the very ills that PASPA sought to combat." Accordingly, injunctive relief is imperative to prevent the irreparable injury that will occur should the 2014 Sports Wagering Law take effect

and defendants or anyone else begin sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling pursuant to its terms.

The Parties

13. Plaintiff the NCAA is a voluntary unincorporated association of approximately 1,300 members consisting of colleges, universities, conferences, associations, and other educational institutions. Governed by its member institutions, the NCAA's fundamental purpose is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body. The NCAA's headquarters are located at 700 West Washington Street, Indianapolis, Indiana 46204.

14. Plaintiff the NBA is a voluntary membership association that operates a professional basketball league consisting of thirty members and their member teams, with its principal place of business located at 645 Fifth Avenue, New York, New York 10022. The NBA engages in the production and marketing of NBA basketball and operates a professional basketball league in the United States and Canada.

15. Plaintiff the NFL is an unincorporated association controlled by its thirty-two constituent member clubs. Originally formed in 1920 as the American Professional Football Conference, the league has been operating under the NFL moniker since 1922. The NFL's headquarters are located at 345 Park Avenue, New York, New York 10154.

16. Plaintiff the NHL is an unincorporated association, composed of thirty Member Clubs that are located throughout the United States and Canada. The NHL League Office headquarters are located at 1185 Avenue of the Americas, New York, New York 10036.

17. Plaintiff MLB is an unincorporated association whose members are the thirty Major League Baseball Clubs. MLB, on behalf of its members, has responsibility for administrative and operational matters relating to Major League Baseball. MLB headquarters are located at 245 Park Avenue, New York, New York 10167.

18. Defendant Christopher J. Christie is the governor of the State of New Jersey. Elected to office in November 2009, Governor Christie was sworn into office on January 19, 2010. Governor Christie was a defendant in *Christie*, and is bound by the permanent injunction entered in that case.

19. Defendant David L. Rebuck is an assistant attorney general of the State of New Jersey and the current director of the New Jersey Division of Gaming Enforcement ("DGE"), an agency created by N.J. Stat. 5:12-55 that operates as a division of the Department of Law and Public Safety. The director of the DGE is appointed by the governor with the advice and consent of the New Jersey Senate. Defendant Rebuck has primary responsibility for overseeing casino operations in New Jersey. Defendant Rebuck was a defendant in *Christie*, and is bound by the permanent injunction entered in that case. Defendant Rebuck is responsible for licensing and overseeing casinos within the State of New Jersey, and upon information and belief will

license and oversee casinos that operate sports betting pools established under the 2014 Sports Wagering Law if not enjoined.

20. Defendant Frank Zanzuccki is the executive director of the New Jersey Racing Commission, an agency created by N.J. Stat. 5:5-22 that advocates the growth, development and promotion of the horse racing industry in the state. The executive director is appointed by the nine commissioners of the New Jersey Racing Commission, each of whom is appointed by the governor with the advice and consent of the New Jersey Senate. N.J. Stat. 5:5¬ 23, 25. Defendant Zanzuccki is responsible for licensing and overseeing horse racing tracks within the State of New Jersey, and upon information and belief will license and oversee horse racing tracks that operate sports betting pools established under the 2014 Sports Wagering Law if not enjoined.

21. Defendant New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA") is the licensed operator and permit holder of Monmouth Park Racetrack. As a racetrack operator and holder of a permit from the State of New Jersey, NJTHA is subject to regulations of both the New Jersey Racing Commission and the DGE. NJTHA intervened as a defendant in *Christie*.

22. Defendant New Jersey Sports and Exposition Authority ("NJSEA") is a "public body corporate and politic" established by New Jersey statute and comprising of, *inter alia*, the New Jersey state treasurer and members appointed by the governor and New Jersey Legislature. N.J. Stat. 5:10-4. NJSEA owns,

among other venues, Monmouth Park and the Meadowlands.

Jurisdiction and Venue

23. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1367.

24. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b).

PASPA Prevents States From Sponsoring, Operating, Advertising, Promoting, Licensing, Or Authorizing Sports Gambling

25. PASPA was enacted on October 28, 1992, and became effective on January 1, 1993, amid growing public concern over the significant harm that would result from the spread of gambling on amateur and professional sporting events in the United States. With four narrow exceptions not applicable to this case, PASPA makes it unlawful for any "governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" and any "person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity" any "lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." (28 U.S.C. § 3702.)

26. PASPA explicitly gives amateur and professional sports organizations, like plaintiffs, standing to seek an injunction for any violation of its provisions. (28 U.S.C. § 3703.)

27. Under the plain terms of PASPA, New Jersey is expressly barred from sponsoring, operating, advertising, promoting, licensing, or authorizing sports-based gambling, and casinos and racetracks within the state are prohibited from engaging in such activities pursuant to state law.

All Gambling Within New Jersey Is Prohibited Unless Specifically Permitted By The New Jersey State Constitution

28. The New Jersey Constitution prohibits any kind of gambling not specifically permitted by that document. (*In the Matter of Petition of Casino Licensees*, 268 N.J. Super. 469, 472 (App. Div.), *aff'd*, 138 N.J. 1 (1993).) The New Jersey Constitution provides:

> No gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by, the legally qualified voters of the State voting at a general election....

(N.J. Const. Art. IV, § VII, ¶ 2.)

29. The New Jersey Constitution provides certain, narrow exceptions to the foregoing broad prohibition, such as exemptions for state lotteries and charitable contests. (*See id.*) Relevant to the instant case, the New Jersey Constitution expressly provides, however, that no type of gambling may be conducted in such Atlantic City casinos or gambling houses unless it has been authorized by the Legislature. Specifically, the New Jersey Constitution states:

> It shall be lawful for the Legislature to authorize by law the establishment and operation, under regulation and control by the State, of gambling houses or casinos within the boundaries, as heretofore established, of the city of Atlantic City, county of Atlantic, and to license and tax such operations and equipment used in connection therewith . . . **The type and number of such casinos or gambling houses and of the gambling games which may be conducted in any such establishment shall be determined by or pursuant to the terms of the law authorizing the establishment and operation thereof.** It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New

> Jersey college team participates regardless of where the event takes place.

(N.J. Const., art. IV, § VII, ¶ 2D (emphases added).)

30. The New Jersey Constitution further permits the Legislature to authorize by law certain forms of gambling at New Jersey racetracks, provided, however, that those activities are "under restrictions and control" of the state:

> It shall be lawful for the Legislature to authorize, by law, the specific kind, restrictions and control of wagering on the results of live or simulcast running and harness horse races conducted within or outside of this State . . . It shall also be lawful for the Legislature to authorize by law wagering at current or former running and harness horse racetracks in this State on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place.

(N.J. Const., art. IV, § VII, ¶ 2F.)

31. The New Jersey Constitution, therefore, prohibits any type of gambling, including sports gambling, from being conducted in Atlantic City casinos or

New Jersey racetracks unless such gambling is expressly authorized by law and subject to the regulation and control of the State of New Jersey.

This Court Permanently Enjoined New Jersey From Sponsoring, Operating, Advertising, Promoting, Licensing, Or Authorizing Sports Gambling

32. On January 17, 2012, Governor Christie signed the 2012 Sports Wagering Law, N.J. Stat. 5:12A-1, *et seq.*, which authorized sports gambling at Atlantic City casinos and New Jersey racetracks upon the approval of the DGE and, for the racetracks, the New Jersey Racing Commission, and in accordance with applicable regulations promulgated pursuant to the statute. (N.J. Stat. 5:12A-2.)

33. On August 7, 2012, plaintiffs filed a complaint in this Court against Governor Christie and defendants Rebuck and Zanzuccki (collectively, the "*Christie* defendants") seeking a declaration that the 2012 Sports Wagering Law violated PASPA insofar as it purported to enable the State of New Jersey and its officials to sponsor, operate, advertise, promote, license, and/or authorize sports betting schemes in New Jersey. On August 10, 2012, plaintiffs moved for summary judgment.

34. On February 28, 2013, this Court granted plaintiffs' motion for summary judgment and permanently enjoined the *Christie* defendants from "sponsoring, operating, advertising, promoting, licensing, or authorizing a lottery, sweepstakes, or other betting,

gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." (*Christie*, 926 F. Supp. 2d at 578-79.)

35. On September 17, 2013, the Third Circuit Court of Appeals affirmed the grant of summary judgment and entry of the permanent injunction. (730 F.3d 208 (3d Cir. 2013).) On November 15, 2013, the Third Circuit denied New Jersey's petition for a rehearing *en banc*. On June 23, 2014, the United States Supreme Court denied defendants' petition for a writ of certiorari. (134 S. Ct. 2866 (2014).)

Undeterred, The New Jersey Legislature Passes A Bill To Authorize Sports Wagering In Casinos And Racetracks

36. In May 2014, before the United States Supreme Court had ruled on the *Christie* defendants' petition for a writ of certiorari, Senator Lesniak announced that he had "legislation being drafted and that will be introduced, to allow casinos and racetracks to have sports betting on our premises." ("NJ Sen. Lesniak to craft sports betting bill for racetracks, casinos," May 19, 2014 (available at www.northjersey.com/news/nj-sen-lesniak-to-craft-sports-betting-bill-for-racetracks-casinos-1.1019252).) According to Senator Lesniak, notwithstanding the judgment of two federal courts, and any action the Supreme Court may take, "we will push the envelope on sports betting [and] we are not going to be deterred." (*Id.*)

37. On June 23, 2014, the same day that the Supreme Court denied the *Christie* defendants' certiorari petition, Senator Lesniak and others in the Legislature introduced S2250, a bill designed to achieve precisely the same thing as the 2012 Sports Wagering Law that this Court enjoined namely, authorize sports gambling at casinos and racetracks. S2250 attempted to do so by "partially repealing" New Jersey's statutory prohibitions only as applied to "sports wagering in casinos in Atlantic City and at racetracks across New Jersey." The legislation explicitly stated that it was passed "in response to the decision of the ... Third Circuit." Three days later, the Legislature passed S2250 without floor debate or other recorded discussion concerning the bill.

38. On July 6, 2014, Senator Lesniak explained the purpose of S2250, which was, in essence, the same as the purpose behind the 2012 Sports Wagering Law: "Legalizing sports wagering recognizes the inevitable—that people are going to bet on sports, whether the practice is legal or not, and that we should provide a safe and legal avenue for them to bet on their favorite teams. By mainstreaming sports wagering, we can . . . put it in the regulated hands of existing casino and racetrack operators. And we can create new jobs and new economic opportunities for our ailing gaming establishments." ("Sen. Raymond J. Lesniak / Sports betting fight must continue," July 6, 2014 (available at www.pressofatlanticcity.com/opinion/commentary/sen-raymond-j-lesniak-sports-betting-fight-must-continue/article_a486fcd0-04fe-11e4-b21e-001a4bcf887a.html).)

39. On August 8, 2014, Governor Christie vetoed S2250, describing the bill as a "novel attempt to circumvent the Third Circuit's ruling" by, "[i]n essence, partially deregulat[ing] betting at casinos and racetracks in an attempt to sidestep federal law." ("Inside the Chris Christie New Jersey Sports Betting Veto," August 9, 2014 (available at http://www.4flush.com/casino-news/inside-the-chris-christie-new-jersey-sports-betting-veto/17548).) Noting that the bill was "rushed to final passage," Governor Christie reiterated that he could not support "[i]gnoring federal law" because "the rule of law is sacrosanct, binding on all Americans." (*Id.*)

The Governor's Office Acts To Authorize Sports Wagering

40. Notwithstanding the Governor's disapproval of the legislature's blatant attempt to circumvent PASPA and this Court's judgment, on September 8, 2014, New Jersey's acting attorney general issued and declared immediately effective a directive to state agencies to stop enforcing existing prohibitions on sports gambling in casinos and racetracks.

41. This directive announced the Governor's newly minted and blatantly atextual position that the provisions of the 2012 Sports Wagering Law that expressly stated that permitted casinos and racetracks "may operate a sports pool"—*i.e.*, the provisions that state officials throughout the *Christie* litigation had touted as authorizing sports betting in New Jersey—were, in fact, not an authorization of sports betting at all, but merely a repeal of existing state prohibitions

on sports betting at such venues. As such, the directive declared that the most critical provisions of the 2012 Sports Wagering Law were not invalided by this Court's injunction or the Third Circuit's decision affirming it, but rather "remain in force and effect."

42. In light of this novel position, the acting attorney general instructed the Division of Criminal Justice and the Department of Law and Public Safety that they should not object to or seek, either criminally or civilly, to enjoin a sports pool operated by a casino or racetrack, provided that such sports pool does not permit wagering on college sporting events that take place in New Jersey or in which any New Jersey college team participates.

43. The *Christie* defendants did not ask this Court to sanction this end-run around its permanent injunction beforehand. Instead, they waited until the directive was already issued and declared immediately effective, and only then moved this Court to "clarify" or, alternatively, "modify" its permanent injunction to permit New Jersey's transparent effort to sponsor, operate, advertise, promote, license, and/or authorize sports betting pursuant to the 2012 Sports Wagering Law that this Court had already held preempted by PASPA.

44. Plaintiffs and the United States Department of Justice filed their opposition to the motion on September 29, 2014. Before the *Christie* defendants' reply briefs were due, however, on October 17, 2014, Governor Christie signed the 2014 Sports Wagering Law which, among other things, repealed the 2012 Sports

Wagering Law. The *Christie* defendants then withdrew their pending motion for clarification and/or modification of the permanent injunction.

New Jersey Passes *Another* Bill To Authorize Sports Wagering In Casinos And Racetracks

45. The 2014 Sports Wagering Law is New Jersey's latest attempt to accomplish exactly what Congress and this Court have already prohibited it from doing: sponsor, operate, advertise, promote, license, and/or authorize sports betting. The 2014 Sports Wagering Law does so by purporting to "repeal" prohibitions, rules, and regulations on sports gambling, but doing so *only* at Atlantic City casinos and New Jersey racetracks—in other words, only at venues that already are required by state law to obtain a license to operate and offer *any* kind of gambling, and subject to a whole host of rules and regulations on the manner in which they may operate.

46. To that end, in addition to repealing the 2012 Sports Wagering Law, the 2014 Sports Wagering Law purports to repeal any rules and regulations at casinos and racetracks that are *specific* to sports gambling.

47. What the bill does *not* repeal, however, is the requirement to obtain a license from the state to operate a casino or racetrack, or the scores of rules and regulations with which casinos and racetracks must comply in order to maintain such a license. *See, e.g.*, N.J. Stat. 5:12-96 (casinos may not conduct gaming or remain open without a valid operation certificate from

the state); 5:12-100 (only permitting conduct of "authorized games" in casinos); 5:5-50 (establishing permitting obligations for racetracks); § 5:5-30 (NJRC has "full power to prescribe rules, regulations and conditions under which all horse races shall be conducted"); 5:5-63 (New Jersey Racing Commission must approve all mutuel boards or machines that display wagering odds); 5:5-67 (recordkeeping requirements for racetracks); 5:12-130 (sanctioning "unlawful acts" by casino licensees); *see generally* N.J.A.C. 13:69-74B (regulations governing casino gambling and horse racetracks).

48. The 2014 Sports Wagering Law also does not repeal existing prohibitions on sports gambling with respect to "a collegiate sport contest or collegiate athletic event that takes place in New Jersey or . . . in which any New Jersey college team participates regardless of where the event takes place." This statutory language tracks verbatim the New Jersey Constitution's limitation on the scope of the legislature's power "to authorize by law" sports gambling, thus underscoring that the Legislature itself recognized that it was authorizing sports gambling when it enacted the 2014 Sports Wagering Law (N.J. Const., art. IV, § VII, ¶¶ 2D, 2F), as well as the harm it was causing to those whose games would be the subject of the state's wagering scheme.

49. The 2014 Sports Wagering Law also does not (indeed, could not) repeal the New Jersey Constitution provisions prohibiting all types of gambling—and especially all types of gambling at Atlantic City casinos and New Jersey racetracks—unless they are spe-

cifically authorized by law and subject to the regulation and control of the State of New Jersey. Once again, this underscores that the Legislature understood that it was exercising its power to *authorize* sports gambling, regardless of the window dressing in which it was engaged.

50. In fact, all of the long-standing state prohibitions against wagering remain in place following the state's fictional "repeal" of its wagering laws. In addition to the state's Constitutional prohibitions against wagering remaining, all of the state's civil prohibitions against gambling remain intact. *See*, *e.g.*, N.J. Stat. 2A:40-1 ("All wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event, shall be unlawful."). Likewise, all of the State's criminal prohibitions against gambling remain unchanged. *See*, *e.g.*, N.J. Stat. 2C:37-2 (prohibiting promotion of gambling).

51. Thus, the state has hardly "repealed" any of its myriad anti-gambling laws, or even a single part of those laws. Rather, the state has merely exempted from these laws two narrow groups—state-licensed casinos and state-licensed racetracks—all in a clear effort to authorize and promote sports wagering.

52. Indeed, the bill's sponsors have made clear that the 2014 Sports Wagering Law is intended to authorize and promote sports wagering in Atlantic City casinos and New Jersey racetracks. Senator Lesniak stated that the purpose of the 2014 Sports Wagering Law is the same as that of the 2012 Sports Wagering Law: "Sports betting will be a lifeline to the casinos,

putting people to work and generating economic activity in a growth industry." ("Kyrillos and Lesniak Fast Track Sports Betting Legislation," October 1, 2014 (available at http://www.moremonmouthmusings.net/2014/10/01/kyrillos-and-lesniak-fast-track-sports-betting-legislation/).) Speaking about the new law prior to the governor's signature, Senator Lesniak said, "We are a short step away from getting this done and a lot closer to bringing sports betting to New Jersey." ("Sports betting bill heads to Christie's desk after Assembly Approval," October 16, 2014 (available at http://www.njbiz.com/article/20141016/NJBIZ01/141019817/Sports-betting-bill-heads-to-Christie%E2%80%99s-desk-after-Assembly-approval).) He explained that "[i]t's been a long, tough effort and we've gone up against powerful interests, but now there is an urgency because sports gaming will be a lifeline to the Atlantic City casino industry at a critical time. It will produce jobs, generate economic activity and be a long-term benefit to New Jersey. I urge the governor to sign it into law as fast he can." (*Id.*)

53. Assemblyman Ralph Caputo offered a similar rationale for the law: "We want to give the racetracks a shot in the arm. We want to help Atlantic City. We want to do something for the gaming business in the state of New Jersey." ("Sports leagues continue push against N.J. wagering; lawmaker hones bill to permit it," September 30, 2014 (available at http://www.newsworks.org/index.php/arts-culture/item/73396-college-pro-sports-continues-push-against-nj-wagers).) "Everyone recognizes the problems of Atlantic City and the racetracks," Assemblyman Caputo said before the law's enactment. ("Sports

betting bill heads to Christie's desk after Assembly Approval" (*see supra* ¶ 52).) "This would be a tremendous boost and a historic move for the state of New Jersey to permit that kind of activity here." (*Id.*)

54. "Sports betting can assist New Jersey's struggling casino industry and with our challenges at Monmouth Park Racetrack," Senator Joseph M. Kyrillos, another of the bill's sponsors, said prior to the governor's signature. (*Id.*) "Both houses of the Legislature acted quickly to approve this critical measure and I am confident Governor Christie will join our efforts to help protect Atlantic City and Monmouth Park jobs by signing the bill into law." (*Id.*)

State-Owned Monmouth Park Racetrack's Immediate Plans To Commence Sports Wagering Pursuant To The 2014 Sports Wagering Law

55. Within hours of Governor Christie's signing of the 2014 Sports Wagering Law, Monmouth Park Racetrack announced that it will "begin offering and accepting wagers on sporting contests and athletic events on Sunday, Oct. 26 at the racetrack." ("Monmouth Park To Start Sports Betting October 26," October 17, 2014 (available at http://www.monmouthpark.com/News.aspx?id= 8985).)

56. Monmouth Park Racetrack is owned by defendant NJSEA, which is a legislatively created "instrumentality of the state exercising public and essential governmental functions." N.J. Stat. 5:10-4(a). Revenue derived from the NJSEA "shall be deemed and held to be applied in support of government." (*Id.*)

57. Accordingly, any sports wagering at Monmouth Park (or the NJSEA-owned Meadowlands Racetrack) would violate the provisions of PASPA that prohibit a state from directly sponsoring, operating, or advertising sports wagering, regardless of whether those facilities purport to offer gambling pursuant to a state authorization or a state repeal.

COUNT I
(Violation of PASPA, 28 U.S.C. § 3702(1))
(Against Defendants Christie, Rebuck and Zanzuccki)

58. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as though fully set forth herein.

59. PASPA prohibits any governmental entity from sponsoring, operating, advertising, promoting, licensing or authorizing sports gambling, sports wagering, or a sports lottery. (28 U.S.C. § 3702(1).)

60. Despite its "repeal" language, the 2014 Sports Wagering Law is a blatant attempt by the State of New Jersey to sponsor, operate, advertise, promote, license and/or authorize sports gambling in Atlantic City casinos and at New Jersey racetracks. As such, the 2014 Sports Wagering Law violates PASPA.

61. If the 2014 Sports Wagering Law is not declared unlawful and injunctive relief not granted, the proliferation of state-sponsored and approved sports gambling in Atlantic City casinos and at New Jersey racetracks will cause immediate and irreparable harm to plaintiffs. Indeed, the harm will be precisely

the same as the harm this Court already found sufficient to warrant injunctive relief when the same plaintiffs challenged the 2012 Sports Wagering Law. As the Court already concluded, monetary damages would be inadequate to compensate plaintiffs for the irreparable injuries they will suffer.

COUNT II
(Violation of New Jersey Constitution)
(Against All Defendants)

62. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as though fully set forth herein.

63. Under the New Jersey Constitution, no gambling activity may be conducted within an Atlantic City casino or at a New Jersey racetrack unless it is expressly authorized by law.

64. If the 2014 Sports Wagering Law does not constitute the authorization by law of sports gambling in violation of PASPA, then it violates Article IV, Section VII of the New Jersey Constitution.

65. If the 2014 Sports Wagering Law is not declared unlawful and injunctive relief not granted, the proliferation of state-sponsored and approved sports gambling in Atlantic City casinos and at New Jersey racetracks will cause immediate and irreparable harm to plaintiffs. Indeed, the harm will be precisely the same as the harm this Court already found sufficient to warrant injunctive relief when the same plaintiffs challenged the 2012 Sports Wagering Law. As the Court already concluded, monetary damages

would be inadequate to compensate plaintiffs for the irreparable injuries they will suffer.

COUNT III
(Violation of PASPA, 28 U.S.C. § 3702(1))
(Against Defendant NJSEA)

66. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as though fully set forth herein.

67. PASPA prohibits any governmental entity from sponsoring, operating, advertising, promoting, licensing or authorizing sports gambling, sports wagering, or a sports lottery. (28 U.S.C. § 3702(1).)

68. NJSEA is a governmental entity. It owns the Monmouth Park Racetrack and has licensed and authorized NJTHA to offer sports gambling activities at Monmouth Park pursuant to the 2014 Sports Wagering Law. It also owns the Meadowlands racetrack, at which sports wagering might also be commenced pursuant to the 2014 Sports Wagering Law. Any sports gambling at Monmouth Park or Meadowlands racetracks would constitute sponsorship, operation, authorization, and promotion of sports gambling by NJSEA, a governmental entity, in violation of PASPA. (28 U.S.C. § 3702(1).)

69. If the 2014 Sports Wagering Law is not declared unlawful and injunctive relief not granted, the proliferation of state-sponsored and approved sports gambling in Atlantic City casinos and at New Jersey racetracks will cause immediate and irreparable harm to plaintiffs. Indeed, the harm will be precisely

the same as the harm this Court already found sufficient to warrant injunctive relief when the same plaintiffs challenged the 2012 Sports Wagering Law. As the Court already concluded, monetary damages would be inadequate to compensate plaintiffs for the irreparable injuries they will suffer.

COUNT IV
(Violation of PASPA, 28 U.S.C. § 3702(2))
(Against Defendant NJTHA)

70. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as though fully set forth herein.

71. Under the plain language of PASPA, persons or entities in New Jersey are prohibited from sponsoring, operating, advertising, or promoting, pursuant to the law or compact of a governmental entity, sports gambling, sports wagering, or a sports lottery. (28 U.S.C. § 3702(2).)

72. Defendant NJTHA has announced its intention to begin sports gambling activities at Monmouth Park pursuant to the 2014 Sports Wagering Law. Such sports gambling would constitute sponsorship, operation, advertising, or promotion of sports wagering pursuant to the law of a governmental entity in violation of PASPA.

73. In addition, because the NJTHA's operation of Monmouth Park is pursuant to an agreement with defendant NJSEA, the conduct of sports wagering at Monmouth Park constitutes sponsorship, operation, advertising, or promotion of sports wagering pursuant

to a compact with a governmental entity in violation of PASPA.

74. If the 2014 Sports Wagering Law is not declared unlawful and injunctive relief not granted, the proliferation of state-sponsored and approved sports gambling in Atlantic City casinos and at New Jersey racetracks will cause immediate and irreparable harm to plaintiffs. Indeed, the harm will be precisely the same as the harm this Court already found sufficient to warrant injunctive relief when the same plaintiffs challenged the 2012 Sports Wagering Law. As the Court already concluded, monetary damages would be inadequate to compensate plaintiffs for the irreparable injuries they will suffer.

WHEREFORE, plaintiffs respectfully seek an Order of this Court:

a. Declaring that the 2014 Sports Wagering Law violates PASPA by sponsoring, operating, advertising, promoting, licensing, and/or authorizing sports betting schemes in Atlantic City casinos and New Jersey racetracks;

b. Alternatively declaring that the 2014 Sports Wagering Law violates the New Jersey Constitution;

c. Pursuant to PASPA, preliminarily and permanently enjoining defendants, and all others acting on their authority, instruction, and behalf, or under the authority of their respective offices, from implementing or enforcing the 2014 Sports Wagering Law, and from sponsoring, operating, advertising, promoting, licensing, or authorizing any lottery,

sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly, on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games;

d. Alternatively, pursuant to the New Jersey Constitution, preliminarily and permanently enjoining defendants, and all others acting on their authority, instruction, and behalf, or under the authority of their respective offices, from implementing or enforcing the 2014 Sports Wagering Law;

e. Awarding plaintiffs their costs and attorneys' fees; and

f. Granting such other and further relief as may be appropriate.

Dated: October 20, 2014

Respectfully Submitted,

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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, NATIONAL BASKETBALL ASSOCIATION, a joint venture, NATIONAL FOOTBALL LEAGUE, an unincorporated association, NATIONAL HOCKEY LEAGUE, an unincorporated association, and OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball,	:	**UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY** Civil Action No. 3:14-cv-06450(MAS)(LHG) **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR APPLICATIONS FOR A TEMPORARY RESTRAINING**

Plaintiffs, v. CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission, NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC., and NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, Defendants.	**ORDER, PRELIMINARY INJUNCTION, AND TO ENFORCE THE PERMANENT INJUNCTION ISSUED IN 12-CV-04947**
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, NATIONAL BASKETBALL ASSOCIATION, a joint venture, NATIONAL FOOTBALL LEAGUE, an unincorporated association, NATIONAL HOCKEY	Civil Action No. 3:12-cv-4947 (MAS) (LHG)

LEAGUE, an unincorporated association, and OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball,

Plaintiffs,

v.

CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission,

Defendants,

and

STEPHEN M. SWEENEY, President of the New Jersey Senate, SHEILA Y. OLIVER, Speaker of the New Jersey General Assembly, and NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Defendant-Intervenors	:
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Preliminary Statement

Plaintiffs National Collegiate Athletic Association (the "NCAA"), National Basketball Association (the "NBA"), National Football League (the "NFL"), National Hockey League (the "NHL"), and Office of the Commissioner of Baseball doing business as Major League Baseball ("MLB"), respectfully submit this memorandum of law in support of their motion for a temporary restraining order and a preliminary injunction, enjoining defendants from giving effect to Senate Bill 2460 (the "2014 Sports Wagering Law"), and to enforce this Court's previous injunction, entered in *National Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551, 577-79 (D.N.J.), *aff'd*, 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014).

The 2014 Sports Wagering Law, which defendant Governor Christopher J. Christie signed into law on Friday, October 17, 2014, constitutes New Jersey's latest effort—in defiance of both this Court's February 28, 2013 Order and clear and binding federal law—to accomplish what it unsuccessfully attempted to do nearly three years ago: sponsor, operate, advertise, promote, license, or authorize gambling on amateur and professional sports at state-licensed casinos and horse racetracks. Because this effort is no more lawful than New Jersey's past efforts to do the same thing, it, too, should be enjoined.[1]

---

[1] A copy of S2460, enacted as P.L. 2015, c. 62, is attached as Exhibit 1 to the Declaration of Anthony J. Dreyer, sworn to on October 20, 2014, and submitted herewith ("Dreyer Decl.").

The federal Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701, *et seq.* ("PASPA"), with limited exceptions not applicable here, makes it unlawful for any "governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" any "lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." 28 U.S.C. § 3702.

For years, New Jersey has been attempting to devise a way to get around these unambiguous prohibitions and authorize sports gambling specifically at Atlantic City casinos and horse racetracks throughout the State—and at those state-authorized gambling venues alone. New Jersey's efforts began in 2012, when it enacted the New Jersey Sports Wagering Law, N.J. Stat. 5:12A-1, *et seq.* (the "2012 Sports Wagering Law"), an open and acknowledged effort to authorize sports gambling in Atlantic City casinos and at New Jersey racetracks. Plaintiffs successfully challenged that statute as a violation of PASPA and, on February 28, 2013, this Court permanently enjoined Governor Christie and defendants David L. Rebuck, director of the New Jersey Division of Gaming Enforcement and assistant attorney general of the State of New Jersey, and Frank Zanzuccki, executive director of the New Jersey Racing Commission, from implementing or enforcing it. *Christie*, 926 F. Supp. 2d at 577-79.

On June 26, 2014, three days after the United States Supreme Court denied defendants' petition for certiorari in the *Christie* matter, the Legislature passed Senate Bill 2250, legislation that purported to "repeal" the State's prohibitions on sports gambling, but to do so only at casinos and racetracks, which already are required to obtain a license to offer any form of gambling and to comply with scores of rules and regulations to maintain that license. Governor Christie vetoed that legislation as a transparent attempt to circumvent this Court's injunction in *Christie* and PASPA's prohibitions.

On September 8, 2014, Governor Christie, through the State's acting attorney general, issued a directive positing that, notwithstanding the unambiguous terms of this Court's injunction, the operative provisions of the 2012 Sports Wagering Law—which provided that the casinos and racetracks "may operate a sports pool"—remained effective as a "repeal" of previous statutes prohibiting sports wagering, rather than an "authorization" of sports gambling. Only after declaring the directive effective immediately did the governor ask this Court to clarify and/or modify the *Christie* injunction to conform to this dubious theory.

On October 17, 2014, before this Court could consider the State's last attempt to circumvent the *Christie* injunction, Governor Christie signed into law the 2014 Sports Wagering Law, which repealed the 2012 Sports Wagering Law in its entirety and replaced it with yet another attempt to authorize sports wagering in Atlantic City casinos and horse racetracks—and in those state-authorized gambling venues alone.

While styled as a "repeal," the 2014 Sports Wagering Law is nothing more than a de facto authorization of sports gambling. Like its vetoed predecessor, the 2014 Sports Wagering Law "repeals" all existing prohibitions, rules, and regulations that are specific to sports wagering (excluding collegiate contests in New Jersey or involving New Jersey colleges or universities), but does so *only* at Atlantic City casinos and horse racetracks throughout the State—in other words, only at state-authorized gambling venues that are already carefully licensed and regulated by the State. The bill's own sponsors have readily acknowledged that the evident purpose and effect of the 2014 Sport Wagering Law is to authorize and promote sports betting at casinos and racetracks. As Assemblyman Ralph Caputo explained: "We want to give the racetracks a shot in the arm. We want to help Atlantic City. We want to do something for the gaming business in the state of New Jersey." (Dreyer Decl. Ex. 2.) Senator Raymond J. Lesniak—perhaps the most ardent and unrelenting proponent of authorized sports betting in New Jersey—similarly told reporters that "Sports betting will be a lifeline to the casinos, putting people to work and generating economic activity in a growth industry." (Dreyer Decl. Ex. 3.)

The conclusion that the 2014 Sports Wagering Law is an authorization, rather than the mere repeal that it purports to be, also is compelled by the New Jersey Constitution. Gambling in New Jersey has been legalized cautiously, such that no gambling may be conducted in the State unless it is permitted by the State's Constitution. And no gambling is permitted under the State's Constitution unless it has been authorized by law by the Legislature. N.J. Const. art. IV,

§ VII, ¶ 2; *In the Matter of Petition of Casino Licensees*, 268 N.J. Super. 469, 472 (App. Div.), *aff'd*, 138 N.J. 1 (1993). Moreover, no gambling may be conducted in Atlantic City casinos unless that gambling has been specifically authorized by law. Article IV, Section VII of the New Jersey Constitution unequivocally provides:

> It shall be lawful for the Legislature to authorize by law the establishment and operation, under regulation and control of the State, of gambling houses or casinos within the boundaries, as heretofore established, of the city of Atlantic City, county of Atlantic, and to license and tax such operations and equipment used in connection therewith. . . The type and number of such casinos or gambling houses and of the gambling games which may be conducted in any such establishment shall be determined by or pursuant to the terms of the law authorizing the establishment and operation thereof.

N.J. Const. art. IV, § VII, ¶ 2D. Thus, under the clear provisions of the New Jersey Constitution, the Legislature and the governor are powerless to permit any form of gambling in Atlantic City casinos unless the games are specifically authorized by law.

As all of the foregoing confirms, the State's latest attempt to authorize sports gambling at its carefully regulated state-authorized gambling venues is just as unlawful as its previous efforts. As the bill's practical operation reveals, its sponsors concede, and the New

Jersey Constitution demands, the 2014 Sports Wagering Law is a blatant effort to authorize sports gambling at venues that are licensed and regulated by the State. It therefore violates both PASPA and this Court's injunction, which prohibits the governor and other state officials from "sponsoring, operating, advertising, promoting, licensing, or authorizing a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." *Christie*, 926 F. Supp. 2d at 577-79. Alternatively, if the law really is nothing more than the repeal that it purports to be, then it violates the New Jersey Constitution, which requires any gambling to be specifically *authorized* by the Legislature.

Injunctive relief is necessary to preserve the longstanding status quo. At least one New Jersey racetrack, Monmouth Park Racetrack, a facility operated by defendant New Jersey Thoroughbred Horsemen's Association ("NJTHA") but owned by defendant New Jersey Sports and Exposition Authority ("NJSEA")—which is a state entity independently prohibited by PASPA from sponsoring, operating, advertising, or promoting sports gambling—has stated its intention to start offering sports gambling pursuant to the 2014 Sports Wagering Law as early as this Sunday, October 26, 2014. (Dreyer Decl. Ex. 4.)

This Court already has held that the spread of state-sponsored sports gambling in New Jersey would

irreparably harm plaintiffs. *Christie*, 926 F. Supp. 2d at 578. Indeed, this Court and the Third Circuit have recognized that the spread of state-sponsored sports gambling "would engender the very ills that PASPA sought to combat." Accordingly, injunctive relief is imperative to prevent the irreparable injury that will occur should the 2014 Sports Wagering Law take effect and defendants or anyone else begin sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling pursuant to its terms.

Statement of Facts

PASPA Prevents States From Sponsoring, Operating, Advertising, Promoting, Licensing, Or Authorizing Sports Gambling

PASPA was enacted on October 28, 1992, and became effective on January 1, 1993, amid growing public concern over the significant harm that would result from the spread of gambling on amateur and professional sporting events in the United States. With four narrow exceptions not applicable to this case, PASPA makes it unlawful for any "governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact"—and any "person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity"—any "lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such

athletes in such games." 28 U.S.C. § 3702. PASPA explicitly gives amateur and professional sports organizations, like plaintiffs, standing to seek an injunction for any violation of its provisions. 28 U.S.C. § 3703.

Under the plain terms of PASPA, New Jersey is expressly barred from sponsoring, operating, advertising, promoting, licensing, or authorizing sports-based gambling, and casinos and racetracks within the State are prohibited from engaging in such activities pursuant to state law.

All Gambling Within New Jersey Is Prohibited Unless Specifically Permitted By The New Jersey Constitution

The New Jersey Constitution prohibits any kind of gambling not specifically permitted by that document. *In the Matter of Petition of Casino Licensees*, 268 N.J. Super. At 472. The New Jersey Constitution provides:

> No gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by, the legally qualified voters of the State voting at a general election . . . .

N.J. Const. Art. IV, § VII, ¶ 2.

The New Jersey Constitution provides certain, narrow exceptions to the foregoing broad prohibition, such as exemptions for state lotteries and charitable contests. *See id.* Relevant to the instant case, the New Jersey Constitution expressly provides that no type of gambling may be conducted in such Atlantic City casinos or gambling houses unless it has been authorized by the Legislature. Specifically, the New Jersey Constitution states:

> It shall be lawful for the Legislature to authorize by law the establishment and operation, under regulation and control by the State, of gambling houses or casinos within the boundaries, as heretofore established, of the city of Atlantic City, county of Atlantic, and to license and tax such operations and equipment used in connection therewith . . . . *The type and number of such casinos or gambling houses and of the gambling games which may be conducted in any such establishment shall be determined by or pursuant to the terms of the law authorizing the establishment and operation thereof.* It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place.

N.J. Const., art. IV, § VII, ¶ 2D (emphases added).

The New Jersey Constitution further permits the Legislature to authorize by law certain forms of gambling at New Jersey racetracks, provided, however, that those activities are under "restrictions and control" of the State:

> It shall be lawful for the Legislature to authorize, by law, the specific kind, restrictions and control of wagering on the results of live or simulcast running and harness horse races conducted within or outside of this State . . . . It shall also be lawful for the Legislature to authorize by law wagering at current or former running and harness horse racetracks in this State on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place.

N.J. Const., art. IV, § VII, ¶ 2F.

The New Jersey Constitution, therefore, prohibits any type of gambling, including sports gambling, from being conducted in Atlantic City casinos or New Jersey racetracks unless such gambling is expressly authorized by law and subject to the regulation and control of the State of New Jersey.

This Court Permanently Enjoined New Jersey From Sponsoring, Operating, Advertising, Promoting, Licensing, Or Authorizing Sports Gambling

On January 17, 2012, Governor Christie signed the 2012 Sports Wagering Law, N.J. Stat. 5:12A-1, *et seq.*, which authorized sports gambling at Atlantic City casinos and New Jersey racetracks upon the approval of the New Jersey Division of Gaming Enforcement ("DGE") and, for the racetracks, the New Jersey Racing Commission, and in accordance with applicable regulations promulgated pursuant to the statute. N.J. Stat. 5:12A-2. On August 7, 2012, plaintiffs filed a complaint in this Court against Governor Christie and defendants Rebuck and Zanzuccki (collectively, the "*Christie* defendants") seeking a declaration that the 2012 Sports Wagering Law violated PASPA insofar as it purported to enable the State of New Jersey and its officials to sponsor, operate, advertise, promote, license, and/or authorize sports betting schemes in New Jersey. On August 10, 2012, plaintiffs moved for summary judgment.

On February 28, 2013, this Court granted plaintiffs' motion for summary judgment and permanently enjoined the *Christie* defendants from "sponsoring, operating, advertising, promoting, licensing, or authorizing a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." *Christie*, 926 F. Supp.

2d at 578-79. On September 17, 2013, the Third Circuit Court of Appeals affirmed the grant of summary judgment and entry of the permanent injunction. 730 F.3d 208 (3d Cir. 2013). On November 15, 2013, the Third Circuit denied New Jersey's petition for a rehearing *en banc*, and on June 23, 2014, the United States Supreme Court denied defendants' petition for a writ of certiorari. 134 S. Ct. 2866 (2014).

Undeterred, The New Jersey Legislature Passes A Bill To Authorize Sports Wagering In Casinos And Racetracks

In May 2014, even before the United States Supreme Court had rejected the *Christie* defendants' petition for a writ of certiorari, Senator Lesniak announced that he had "legislation being drafted and that will be introduced, to allow casinos and racetracks to have sports betting on our premises." (Dreyer Decl. Ex. 5.) According to Senator Lesniak, notwithstanding the judgment of two federal courts, and any action the Supreme Court may take, "we will push the envelope on sports betting [and] we are not going to be deterred." (*Id.*)

On June 23, 2014, the same day that the Supreme Court denied the *Christie* defendants' certiorari petition, Senator Lesniak and others in the Legislature introduced S2250, a bill designed to achieve precisely the same thing as the 2012 Sports Wagering Law that this Court enjoined—authorize sports gambling at state-authorized gambling venues, namely, casinos and racetracks. S2250 attempted to do so by "partially repealing" New Jersey's statutory prohibitions on sports gambling only as to sports wagering in

casinos in Atlantic City and at racetracks across New Jersey. (Dreyer Decl. Ex. 6.) The legislation explicitly stated that it was passed "in response to the decision of the ... Third Circuit." (*Id.*) Three days later, the Legislature passed S2250 without floor debate or other recorded discussion concerning the bill. (Compl., ¶ 37.)

On July 6, 2014, Senator Lesniak explained the purpose of S2250, which was, in essence, the same as the purpose behind the earlier invalidated Sports Wagering Law: "Legalizing sports wagering recognizes the inevitable—that people are going to bet on sports, whether the practice is legal or not, and that we should provide a safe and legal avenue for them to bet on their favorite teams. By mainstreaming sports wagering, we can . . . put it in the regulated hands of existing casino and racetrack operators. And we can create new jobs and new economic opportunities for our ailing gaming establishments." (Dreyer Decl. Ex. 7.)

On August 8, 2014, Governor Christie vetoed S2250, describing the bill as a "novel attempt to circumvent the Third Circuit's ruling" by repealing prohibitions against sports wagering at casinos and racetracks in the State, "[i]n essence . . . partially deregulat[ing] betting at casinos and racetracks in an attempt to sidestep federal law." (Dreyer Decl. Ex. 8.) Noting that the bill was "rushed to final passage," Governor Christie reiterated that he could not support "[i]gnoring federal law" because "the rule of law is sacrosanct, binding on all Americans." (*Id.*)

The Governor's Office Acts To Authorize Sports Wagering

Notwithstanding the governor's apparent disapproval of the Legislature's blatant attempt to circumvent PASPA and this Court's judgment, on September 8, 2014, New Jersey's acting attorney general issued and declared immediately effective a directive to state agencies to stop enforcing existing prohibitions on sports gambling in casinos and racetracks. (Dreyer Decl. Ex. 9.) This directive announced the Executive's newly minted and blatantly atextual position that the provisions of the 2012 Sports Wagering Law that expressly stated that casinos and racetracks "may operate a sports pool"—*i.e.*, the provisions that state officials throughout the *Christie* litigation had touted as authorizing sports betting in New Jersey—were, in fact, not an authorization of sports betting at all, but merely a repeal of existing state prohibitions on sports betting at such venues. (*Id.*) As such, the directive declared, the most critical provisions of the Sports Wagering Law were not invalidated by this Court's injunction or the Third Circuit's decision affirming it, but rather "remain in force and effect." (*Id.*) In light of this novel position, the acting attorney general instructed the Division of Criminal Justice and the Department of Law and Public Safety that they should not object to or seek, either criminally or civilly, to enjoin a sports pool operated by a casino or racetrack, provided that such sports pool does not permit wagering on college sporting events that take place in New Jersey or in which any New Jersey college team participates.

The *Christie* defendants did not ask this Court to sanction this end-run around its permanent injunction beforehand. Instead, they waited until the directive was already issued and declared immediately effective, and only then moved this Court to "clarify" or, alternatively, "modify" its permanent injunction to permit New Jersey's transparent effort to sponsor, operate, advertise, promote, license, and/or authorize sports betting pursuant to the 2012 Sports Wagering Law that this Court had already held preempted by PASPA. Plaintiffs and the United States Department of Justice filed their opposition to the motion on September 29, 2014. Before the *Christie* defendants' reply briefs were due, however, on October 18, 2014, Governor Christie signed the 2014 Sports Wagering Law which, among other things, repealed the 2012 Sports Wagering Law. (Compl. ¶ 44.) The *Christie* defendants then withdrew their pending motion for clarification and/or modification of the permanent injunction. (*Id.*)

New Jersey Passes *Another* Bill To Authorize Sports Wagering In Casinos And Racetracks

The 2014 Sports Wagering Law is New Jersey's latest attempt to accomplish exactly what Congress and this Court have already prohibited it from doing: sponsor, operate, advertise, promote, license, and/or authorize sports betting. The 2014 Sports Wagering Law does so by purporting to "repeal" prohibitions, rules, and regulations on sports gambling, but doing so *only* at Atlantic City casinos and New Jersey racetracks—in other words, only at state-authorized gambling venues already carefully licensed by the State and subject to a whole host of rules and regulations on

the manner in which they may operate. To that end, in addition to repealing the 2012 Sports Wagering Law, the 2014 Sports Wagering Law purports to repeal any rules and regulations at casinos and racetracks that are *specific* to sports gambling. (*See* Dreyer Decl. Ex. 1.)

What the bill does *not* repeal, however, is the requirement of a state license to operate a casino or racetrack, or the scores of rules and regulations with which casinos and racetracks must comply in order to maintain such a license. *See, e.g.*, N.J. Stat. 5:12-96 (casinos may not conduct gaming or remain open without a valid operation certificate from the State); 5:12-100 (only permitting conduct of "authorized games" in casinos); 5:5-50 (establishing obligations for racetracks to obtain permits); 5:5-30 (New Jersey Racing Commission has "full power to prescribe rules, regulations and conditions under which all horse races shall be conducted"); 5:5-63 (New Jersey Racing Commission must approve all pari-mutuel boards or machines that display wagering odds); 5:5-67 (record-keeping requirements for racetracks); 5:12-130 (sanctioning "unlawful acts" by casino licensees); *see generally* N.J.A.C. 13:69-74B (regulations governing casino gambling and horse racetracks).

Nor, tellingly, does the 2014 Sports Wagering Law repeal existing prohibitions on sports gambling with respect to "a collegiate sport contest or collegiate athletic event that takes place in New Jersey or . . . in which any New Jersey college team participates regardless of where the event takes place." This statutory language tracks verbatim the New Jersey Constitution's limitation on the scope of the Legislature's

power "to authorize by law" sports gambling, thus underscoring that the Legislature itself recognized that it was authorizing sports gambling when it enacted the 2014 Sports Wagering Law. N.J. Const., art. IV, § VII, ¶¶ 2D, 2F.

The 2014 Sports Wagering Law also does not (indeed, could not) repeal the New Jersey Constitution provisions prohibiting all types of gambling—and especially all types of gambling at Atlantic City casinos and New Jersey racetracks—unless they are specifically authorized by law and subject to the regulation and control of the State of New Jersey. Once again, this underscores that the Legislature understood that it was not in any sense deregulating sports gambling. On the contrary, the 2014 Law accomplished precisely what its predecessors did: it facilitated sports gambling at state-authorized and state-regulated gambling venues—and at those outposts of state-authorized gambling alone.

In fact, all of the long-standing state prohibitions against wagering remain in place following the State's fictional "repeal" of its wagering laws. In addition to the State's Constitutional prohibitions against wagering remaining, all of the State's civil prohibitions against gambling remain intact. *See, e.g.*, N.J. Stat. 2A:40-1 ("All wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event, shall be unlawful."). Likewise, all of the State's criminal prohibitions against gambling remain unchanged. *See, e.g.*, N.J. Stat. 2C:37-2 (prohibiting promotion of gambling).

Thus, the State has hardly "repealed" any of its myriad anti-gambling laws, or even a single part of those laws. Rather, the State has merely exempted from these laws two, narrow groups: state-licensed casinos and state-licensed racetracks, all in a clear effort to authorize and promote sports wagering that is authorized and regulated by the State. Indeed, the bill's sponsors have made clear that the 2014 Sports Wagering Law is intended to authorize and promote sports wagering in Atlantic City casinos and New Jersey racetracks. Senator Lesniak stated that the purpose of the 2014 Sports Wagering Law is the same as that of the 2012 Sports Wagering Law: "Sports betting will be a lifeline to the casinos, putting people to work and generating economic activity in a growth industry." (Dreyer Decl. Ex. 3.) Speaking about the new law prior to the governor's signature, Senator Lesniak said, "We are a short step away from getting this done and a lot closer to bringing sports betting to New Jersey." (Dreyer Decl. Ex. 10.) He explained that "[i]t's been a long, tough effort and we've gone up against powerful interests, but now there is an urgency because sports gaming will be a lifeline to the Atlantic City casino industry at a critical time. It will produce jobs, generate economic activity and be a long-term benefit to New Jersey. I urge the governor to sign it into law as fast he can." (*Id.*) "I have new legislation," Senator Lesniak explained, "very similar to the one [Governor Christie] vetoed. I believe he'll sign it this time and we'll soon be up and running and be able to take sports bets and bring some life into Atlantic City and our racetracks and bring those jobs back." (Dreyer Dec. Ex. 11.) "We'd only be doing in New Jersey what they are doing in Nevada." (Dreyer Decl. Ex. 12.)

These sentiments about the 2014 Sports Wagering Law have been echoed by Senator Lesniak's colleagues. Assemblyman Ralph Caputo stated: "This would be a tremendous boost and a historic move for the state of New Jersey to permit that kind of activity here." (Dreyer Decl. Ex. 10.) "We want to give the racetracks a shot in the arm. We want to help Atlantic City. We want to do something for the gaming business in the state of New Jersey, which has been under tremendous duress from the closings, which occurred down in Atlantic City." (Dreyer Decl. Ex. 2.) Senator Jim Whelan expressed the same view: "Gaming will always be an important part of our attractions and sports betting will expand on it. This is good for Atlantic City, for the casino industry and the state." (Dreyer Decl. Ex. 13.)

"Sports betting can assist New Jersey's struggling casino industry and with our challenges at Monmouth Park Racetrack," Senator Joseph M. Kyrillos, another of the bill's sponsors, said prior to the governor's signature. (Dreyer Decl. Ex. 10.) "Both houses of the Legislature acted quickly to approve this critical measure and I am confident Governor Christie will join our efforts to help protect Atlantic City and Monmouth Park jobs by signing the bill into law." (*Id.*)

State-Owned Monmouth Park Racetrack's Immediate Plans To Commence Sports Wagering Pursuant To The 2014 Sports Wagering Law

Within hours of Governor Christie's signing of the 2014 Sports Wagering Law, Monmouth Park Racetrack announced that it will "begin offering and

accepting wagers on sporting contests and athletic events on Sunday, Oct. 26 at the racetrack." (Dreyer Decl. Ex. 4.)[2] Monmouth Park Racetrack is owned by defendant NJSEA, which is a legislatively created "instrumentality of the State exercising public and essential governmental functions." N.J. Stat. 5:10-4(a). Revenue derived from the NJSEA "shall be deemed and held to be applied in support of government." *Id.* Accordingly, any sports wagering at Monmouth Park (or the NJSEA-owned Meadowlands Racetrack) would violate the provisions of PASPA that prohibit a State from directly sponsoring, operating, promoting, or advertising sports wagering, regardless of the auspices under which such facilities claim authority to do so.

Argument

*A. Plaintiffs Are Entitled To A Temporary Restraining Order And Preliminary Injunction Pursuant to Rule 65(b)***

The primary purpose of temporary or preliminary injunctive relief is to preserve the status quo until a decision on the merits can be rendered. *See Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir.

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[2] When plaintiffs informed the *Christie* defendants that they intended to seek a temporary restraining order against the acting attorney general's directive, the attorney general's office secured written assurances from each Atlantic City casino and New Jersey racetrack that it would not operate a sports wagering pool for 45 days (*i.e.*, until October 25, 2014). (Dreyer Decl. ¶ 23.) The operator of the Monmouth Park racetrack, however, has made his intentions clear: Monmouth Park intends "to start sports betting on the 46th day, unless a judge tells me I can't." (Dreyer Decl. Ex. 14.)

2004); *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990) (reversing denial of preliminary injunction); *Fed'n of State Massage Therapy Boards v. Academy of Oriental Therapy, LLC*, No. 3:13-cv-06317, 2013 WL 5888094, at *1 (D.N.J. Oct. 28, 2013) (granting temporary restraining order). The "status quo" refers to "the last, peaceable, noncontested status of the parties." *Kos Pharm., Inc.*, 369 F.3d at 708 (quoting *Opticians Ass'n of Am.*, 920 F.2d at 197).

The standard for granting a temporary restraining order is the same as that for granting a preliminary injunction. *Fed'n of State Massage Therapy Boards*, 2013 WL 5888094, at *1. A temporary restraining order and preliminary injunction, therefore, should be granted when (i) the movant shows a reasonable likelihood of success on the merits, (ii) the movant demonstrates he is likely to suffer irreparable harm in the absence of preliminary relief, (iii) the harm to the moving party outweighs the harm to the non-moving party, and (iv) granting preliminary relief is in the public interest. *New Jersey Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 385-86 (3d Cir. 2012); *see also Neo Gen Screening, Inc. v. Telechem Int'l, Inc.*, 69 F. App'x 550, 554 (3d Cir. 2003); *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 538 (D.N.J. 1999).

Here, there is no question that the status quo would be fundamentally altered if pursuant to the 2014 Sports Wagering Law, Atlantic City casinos and New Jersey racetracks began offering sports betting—an activity that has never been permitted in New Jersey. Indeed, the proponents of the law made plain

their intent to fundamentally alter the status quo by ushering in lawful sports gambling into New Jersey's state-authorized gambling venues for the very first time. There is also no question that if the conduct challenged here likely violates PASPA, then a temporary restraining order and/or preliminary injunction should issue, as both this Court and the Third Circuit already have concluded that plaintiffs would be irreparably injured by sports gambling on their own games that violates PASPA, and that the balance of hardships and the public interest weigh decidedly in favor of enjoining violations of PASPA. Accordingly, the only real question is whether plaintiffs have demonstrated a reasonable likelihood of success on the merits of their arguments that the conduct challenged here is yet another violation of PASPA. Because they clearly have, this Court should enter an order to prevent casinos and racetracks from rushing to begin offering sports gambling pursuant to 2014 Sports Wagering Law before this Court can even determine whether that law violates PASPA or the New Jersey Constitution.

1. Plaintiffs Have A Reasonable Likelihood Of Success On The Merits

a) The 2014 Sports Wagering Law Violates PASPA

As this Court is well aware, PASPA prohibits any governmental entity from sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling, sports wagering, or a sports lottery. 28 U.S.C. § 3702(1); *accord Christie*, 926 F. Supp. 2d at 577-79. As both this Court and the Third Circuit have

recognized, this does not mean that states must "enact or carry out" prohibitions on sports gambling. 730 F.3d at 237. But it does mean that they must choose between prohibiting sports gambling or "accepting [its] complete deregulation." *Id.* They may not choose half-measures that purport to "repeal" prohibitions, but do so only at state-authorized gambling venues with the inevitable and intended effect of producing state-regulated sports gambling. For instance, if a state put into place a complete regulatory scheme for all forms of gambling that are not expressly prohibited coupled with an express prohibition on sports gambling, it should be obvious that the State could not repeal that prohibition without producing state-sponsored gambling. After all, it is the substance, not the form, of state laws that govern a preemption analysis. *See, e.g., Aetna Health Inc. v. Davila*, 542 U.S. 200, 214-15 (2004) (states may not "elevate form over substance ... to evade" federal preemption).

That is precisely what New Jersey has done here. Although the 2014 Sports Wagering Law purports to be nothing more than a "repeal" of existing prohibitions on sports gambling, that is just word play. All of the State's long-standing criminal and civil prohibitions against gambling remain intact. *See, e.g.*, N.J. Stat. 2A:40-1 ("All wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event, shall be unlawful."); N.J. Stat. 2C:37-2 (prohibiting promotion of gambling). The only thing the 2014 Sports Wagering Law does is provide an exemption from these generally-applicable prohibitions for Atlantic City casinos and New Jersey

racetracks—the very venues at which all gambling operations *already* are subject to a vast state regulatory scheme. To provide an exemption from such general prohibitions only at state-authorized gambling venues is to authorize sports gambling at those venues.

Casinos and racetracks already are required, for instance, to obtain (and pay the State for) a license to operate, and to comply with scores of rules in order to maintain such a license. *See, e.g.*, N.J. Stat. 5:12-96 (casinos may not conduct gaming or remain open without a valid operation certificate from the State); 5:12-100 (only permitting conduct of "authorized games" in casinos); 5:5-50 (establishing obligations for racetracks to obtain permits); 5:5-30 (New Jersey Racing Commission has "full power to prescribe rules, regulations and conditions under which all horse races shall be conducted"); 5:5-63 (New Jersey Racing Commission must approve all pari-mutuel boards or machines that display wagering odds); 5:5-67 (record-keeping requirements for racetracks); 5:12-130 (sanctioning "unlawful acts" by casino licensees); *see generally* N.J.A.C. 13:69-74B (regulations governing casino gambling and horse racetracks). The 2014 Sports Wagering Law does not purport to repeal any of these preexisting regulatory requirements; instead, it simply clears the way for their application to sports gambling as well. By enabling sports gambling to occur only at establishments that must be licensed and regulated by the State, the 2014 Sports Wagering law directly conflicts with the federal policy embodied in PASPA. As the Third Circuit observed: "PASPA makes clear that the federal policy with respect to sports gambling is that such activity should not occur

under auspices of a state license." *Christie*, 730 F.3d at 236.

The 2014 Sports Wagering Law achieves precisely the same end as the 2012 Sports Wagering Law that this Court enjoined as a blatant violation of PASPA. As New Jersey explained in defending that law before the Third Circuit, it was designed to "channel[] sports wagering activity into the *closely regulated* gaming infrastructure New Jersey *already has* in its casinos and race-track," "where it can be monitored, regulated, and appropriately taxed." (NJ Opening Third Cir. Brief (emphasis added)); *see also id.* (2012 Sports Wagering Law will "allow[] *State-regulated* casinos and racetracks to operate legal, regulated, transparent, and taxable sports books" (emphasis added)). By "repealing" existing prohibitions *only* at these "closely" "State-regulated" venues, New Jersey has accomplished exactly what this Court already has concluded federal law prohibits it from doing: authorizing sports gambling that is licensed and regulated by the State.[3]

Indeed, the Legislature itself recognized that the 2014 Sports Wagering Law is really just an authorization in disguise when it made sure to clarify that the law does not repeal existing prohibitions on sports

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[3] Although the 2014 Sports Wagering Law eliminates the language the 2012 Sports Wagering Law added that expressly *includes* revenues from sports wagering in a casino's taxable revenues, the law does not *prohibit* the State from including those revenues in its tax calculations. It is accordingly unclear at this point whether New Jersey believes it may collect taxes on this activity that it purports not to be "licensing" or "authorizing."

gambling with respect to "a collegiate sport contest or collegiate athletic event that takes place in New Jersey or . . . in which any New Jersey college team participates regardless of where the event takes place." (Dreyer Decl. Ex. 1 § 1.) That language, which tracks verbatim the New Jersey Constitution's limitation on the scope of the legislature's power "to authorize by law" sports gambling, N.J. Const., art. IV, § VII, ¶¶ 2D, 2F, would have been wholly unnecessary if the Legislature were washing it hands of sports gambling altogether, rather than exercising its constitutional power to *authorize* it.

In short, notwithstanding New Jersey's legislators self-serving statements to the effect that they *intend* the 2014 Sports Wagering Law—as they did with its vetoed predecessor, S2250—to comport with the Third Circuit's decision in *Christie*, it is clear that the law does no such thing. The Third Circuit held that "PASPA gives states the choice of either implementing a ban on sports gambling or accepting *complete deregulation of that field*." 730 F.3d at 235 (emphasis added). It did not hold that states that may choose some novel amalgam of the two, under which a state may lift a prohibition on sports gambling only at state-authorized gambling venues and disclaim that it has just authorized sports gambling at those venues (while celebrating the economic benefits that will now flow to those venues).

b) The 2014 Sports Wagering Law Cannot Avoid A Problem Under PASPA Without Running Into A Problem Under The New Jersey Constitution

The conclusion that the 2014 Sports Wagering Law is an attempt to license and authorize, not deregulate, sports gambling also is compelled by the New Jersey Constitution. As previously noted, gambling in New Jersey has been legalized cautiously, such that no gambling may be conducted in the State unless it is permitted by the State's Constitution. And no gambling is permitted under the State's Constitution unless it has been authorized by law by the Legislature. N.J. Const. art. IV, § VII, ¶ 2; *In the Matter of Petition of Casino Licensees*, 268 N.J. Super. 469, 472 (App. Div.), *aff'd*, 138 N.J. 1 (1993). Moreover, no gambling may be conducted in Atlantic City casinos unless that gambling has been specifically authorized by law. N.J. Const. art. IV, § VII, ¶ 2D. Thus, under the clear provisions of the New Jersey Constitution, the Legislature and the governor are powerless to permit any form of gambling in Atlantic City casinos unless it is specifically "authorized by law."

New Jersey courts, like all others, recognize a "strong presumption of constitutionality," and will construe a statute in a manner that sustains its constitutionality if possible. *In the Matter of Village of Loch Arbour*, 25 N.J. 258, 264-65 (N.J. 1957). Accordingly, the New Jersey Constitution is all the more reason to construe the 2014 Sports Wagering Law as authorizing by law sports wagering in Atlantic City casinos and New Jersey racetracks. The law's disclaimer that it is "not intended and shall not be construed as

causing the State to sponsor, operate, advertise, promote, license, or authorize" sports gambling, (Dreyer Decl. Ex. 1, § 2.), in no way prohibits that conclusion, as this transparent attempt to evade PASPA can no more control the State constitutional question than it can the federal preemption question. But if the 2014 Sports Wagering Law really does clear the way for wholly unauthorized, unlicensed, and unregulated sports, the people of New Jersey have rejected the idea of wholly unauthorized and unregulated gambling, and the United States Congress has just as squarely rejected the idea of state-authorized sports gambling. New Jersey's effort to thread the needle therefore cannot succeed: the 2014 Sports Wagering Law necessarily violates either PASPA or the New Jersey Constitution.

c) NJTHA's Offering Of Sports Wagering At State-Owned Monmouth Violates PASPA

As noted above, in addition to making it unlawful for any "governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" any sports wagering, PASPA makes it unlawful for any "person to sponsor, operate, advertise, or promote" sports wagering "pursuant to the law or compact of a governmental entity." 28 U.S.C. § 3702(2). Accordingly, because the 2014 Sports Wagering Law violates PASPA, no casino or racetrack, including Monmouth Park, may sponsor, operate, advertise, or promote sports betting pursuant to it without violating PAPSA as well.

Monmouth Park also may not sponsor, operate, advertise, or promote sport gambling for an additional reason: because it is owned by NJSEA, a governmental entity. Section 3702(1) does not just make it unlawful for a state to license or authorize gambling; it also makes it unlawful for the *State itself* to sponsor, operate, advertise, or promote gambling. In other words, it prohibits the State from acting as a market participant in sports gambling—regardless of whether the State purports to do so under a law that violates PASPA's other restrictions. Accordingly, as a governmental entity, the NJSEA is expressly prohibited from sponsoring or licensing sports wagering schemes. *Id.* § 3702(1). Moreover, because the NJSEA licenses the operations of Monmouth Park to the NJTHA, the NJTHA would likewise violate PASPA if Monmouth Park operating sports betting, as that sports betting would be "pursuant to ... [a] compact" with "a governmental entity." *Id.* § 3702(2).

2. Plaintiffs Will Suffer Irreparable Harm If A Temporary Restraining Order And Preliminary Injunction Are Not Granted

There can be no serious dispute that the 2014 Sports Wagering Law threatens plaintiffs with imminent, irreparable injury. As this Court previously concluded, plaintiffs are injured by "the negative effect" that state-sanctioned sports gambling on their own games "would have upon the perception of the[ir]

games and their relationship with their fans." *Christie*, 2012 WL 6698684, at *4.[4] The Third Circuit agreed, finding that there is a "proven stigmatizing effect of having sporting contests associated with gambling, a link that is confirmed by commonsense and Congress' own conclusions" in PASPA. 730 F.3d at 224.

This stigmatizing effect, moreover, is by its very nature irreparable. *See, e.g., Cellco P'ship v. Hope*, 469 F. App'x 575, 577 (9th Cir. 2012) ("[e]vidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm") (quoting *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001)); *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1157 (10th Cir. 2001) (holding plaintiff suffered irreparable injury because "no remedy could repair the damage to [plaintiff s] reputation and credibility"); *BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 263 (3d Cir. 2000) (damage "to BP's reputation, credibility and ability to license its technology if FCFC's plant became operational, giving rise to the public perception that BP was unable to protect its proprietary trade secrets," constituted irreparable injury); *Pappan Enters., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 805 (3d Cir. 1998) ("Grounds for irreparable injury include loss of

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[4] Indeed, plaintiffs produced substantial evidence in the Christie case of the harms that would result from the operation of sports gambling in New Jersey. (*See, e.g., Christie* Dkt 95-2, at 36-37 (Stmt. No. 39); 58-63 (Stmt. No. 74); 63-72 (Stmt. Nos. 76-79).)

control of reputation, loss of trade, and loss of goodwill.").

Because the whole point of PASPA's prohibitions is to protect plaintiffs from these irreparable injuries, any gambling on their games in violation of PAPSA necessarily constitutes irreparable injury warranting injunctive relief. *See Christie*, 926 F. Supp. 2d at 578 ("the spread of sports gambling would engender the very ills that PASPA sought to combat"); *Kansas Health Care Ass'n v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) ("injury to [plaintiffs] resulting from [Kansas's] noncompliance with the [federal statute]" constituted irreparable injury); *New Jersey Coal. of Auto Retailers v. DaimlerChrysler Motors Corp.*, 107 F. Supp. 2d 495, 500 (D.N.J. 1999) (loss of dealers' statutory rights constituted irreparable injury). Indeed, PASPA gives plaintiffs the right to seek injunctive relief against gambling on their games precisely because, in this context, monetary relief will not suffice. 28 U.S.C. § 3703. Irreparable harm is, by definition, harm that cannot be compensated by monetary damages. *See Opticians Ass'n of Am.*, 920 F.2d at 195. Where, as here, "an injunction is the only relief available to a private party under the Act, it would be an abuse of discretion for the district court now to deny injunctive relief" *Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1175 (9th Cir. 2010).

In short, as this Court already has concluded, plaintiffs will suffer irreparable harm should sports betting on their own games in violation of PASPA occur. Accordingly, the second prong of the test for the

issuance of a temporary restraining order and preliminary injunction is readily satisfied.

3. The Balance Of Equities Favors Issuing A Temporary Restraining Order And Preliminary Injunction

As this Court also already has concluded, the balance of "the relative harm to the parties, *i.e.*, the potential injury to the plaintiff if an injunction does not issue versus the potential injury to the defendant if the injunction is issued," *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 596 (3d Cir. 2002), weighs decidedly in favor of plaintiffs here. Indeed, when the only "hardship" to a defendant is that it comply with PASPA, there is no legally cognizable hardship to the defendant at all. 926 F. Supp. 2d at 578 (holding balance of hardships weighs in favor of the Court entering injunction because "no hardship will befall [a defendant when] [i]n essence, the entrance of a[n] . . . injunction will do nothing more than require that [defendant] comply with federal law"); *see also Sierra Club v. Franklin Cnty. Power of Ill., LLC*, 546 F.3d 918, 936 (7th Cir. 2008) (balance of hardships favors injunction when injunction required defendant to comply with the Clean Air Act); *Coach Inc. v. Fashion Paradise, LLC*, No. 10-4888, 2012 WL 194092, at *9 (D.N.J. Jan 20, 2012) (balance of hardships favored injunction where "[t]he only hardship imposed upon the Defendants is that they obey the law").

By contrast, plaintiffs will suffer significant and irreparable harm, as described above, if Atlantic City casinos and New Jersey racetracks begin taking bets

on sporting events before this Court can even determine whether New Jersey's latest attempt to authorize them to do so is lawful. The balance of hardships in this case therefore clearly weighs in favor of plaintiffs and supports the issuance of a temporary restraining order and preliminary injunction.

4. Granting A Temporary Restraining Order And Preliminary Injunction Is In The Public Interest

Finally, enjoining defendants from violating PASPA will serve the public interest. As this Court previously concluded, "[t]he public interest is favored by protecting valid federal statutes from being infringed upon." 926 F. Supp. 2d at 578; *see also* 11A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2948.4 (2d ed. 1995) ("A federal statute prohibiting the threatened acts that are the subject matter of the litigation has been considered a strong factor in favor of granting a preliminary injunction."); *Garden State Equality v. Dow*, 433 N.J. Super. 347, 363 (N.J. Super. 2013) (recognizing no public interest in a state's ability to enforce an unconstitutional law). And, where, as here, plaintiffs have demonstrated a strong likelihood of success on the merits, "the public interest leans even more toward granting the injunction." *Novartis Consumer Health*, 290 F.3d at 597; *see also American Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994) ("As a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff."). Finally, given

the clear shift from the status quo ante that the legislation seeks to achieve, the public interest would hardly be served by allowing sports gambling to begin for the first time only to have it halted once its incompatibility with PASPA and this Court's injunction is confirmed.

There can be no serious dispute after the last round of litigation that PASPA is a "valid federal statute." *See* 926 F. Supp. 2d at 562-77 (rejecting defendants' constitutional challenges to PAPSA); 730 F.3d at 224-40 (same). And in enacting PASPA, Congress recognized a strong public interest in protecting sports from the harms associated with gambling. *See* S. Rep. No. 102-248, at 4 (noting that PASPA "serves an important public purpose, to stop the spread of State-sponsored sports gambling."); *id.* at 5 ("Sports gambling threatens to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling.") Congress also specifically rejected the notion that a state's interest in boosting its economy is sufficient to outweigh the public's interest in preventing the spread of state-sponsored sports wagering. *See id.* at 7 ("The answer to State budgetary problems should not be to increase the number of lottery players or sports bettors, regardless of the worthiness of the cause. The committee believes the risk to the reputation of one of our Nation's most popular pastimes, professional and amateur sporting events, is not worth it."). Because the whole point of PASPA is to further these important public purposes, it is in the public's interest to enforce PASPA and prevent the spread of state-sponsored sports wagering.

Accordingly, the public interest is best served by granting plaintiffs' request for a temporary restraining order and preliminary injunction and requiring defendants to act within the bounds of federal law.

B. No Bond Should Be Required

The Court has discretion in whether to require a security bond in conjunction with the issuance of a temporary restraining order and may dispense with the requirement altogether when there is no likelihood of harm to the defendants. *Temple Univ. v. White*, 941 F.2d 201, 219-220 (3d Cir. 1991) (recognizing that under certain circumstances the bond requirement under Rule 65(c) could be waived); *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 136 (2d Cir. 1997) (affirming district court's decision not to require bond). Because there is no likelihood of cognizable harm to defendants from the issuance of the requested temporary restraining order, no bond should be required.

C. The Prior Injunction Should Be Enforced Against The Christie Defendants

The *Christie* defendants cannot dispute that this Court entered a valid injunction order against them to enjoin them from "sponsoring, operating, advertising, promoting, licensing, or authorizing a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." *Christie*, 926 F. Supp. 2d at 578-79. Because

the direct effect of the 2014 Sports Wagering Law is to promote gambling on professional and amateur sporting events and to authorize New Jersey casinos and racetracks to engage in such activity, the *Christie* defendants have directly violated this Court's order by implementing and/or enforcing that law, and sponsoring, operating, advertising, promoting, licensing, and/or authorizing sports gambling pursuant to it. Plaintiffs respectfully request that, pursuant to Fed. R. Civ. P. 70, this Court declare that in taking those actions, the *Christie* defendants have violated the Court's order, and further ask the Court to take all other steps necessary to enforce its injunction.

Conclusion

For the foregoing reasons, plaintiffs respectfully request this Court to issue a temporary restraining order and preliminary injunction (i) enjoining defendants from giving effect to the 2014 Sports Wagering Law or taking any other action to sponsor, operate, advertise, promote, license or authorize by law or compact the implementation of any sports gambling in violation of PASPA, the New Jersey Constitution, or otherwise and (ii) enjoining defendants from permitting any individual or entity subject to their authority to engage in such activity. Plaintiffs further request this Court to enforce this Court's previous injunction against the *Christie* defendants.

Dated: October 21, 2014

Respectfully Submitted,

MCCARTER & ENGLISH, LLP

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September 30, 2014

Sports leagues continue push against N.J. wagering; lawmaker hones bill to permit it

A bettor watches a jockey practice before a race at Freehold Raceway in Freehold, New Jersey. A new bill aims to allow sports wagers on professional games at the state's casinos and race tracks. (AP file photo)

By *Phil Gregory*

As professional sports leagues attempt to block New Jersey from allowing sports betting, a state lawmaker is proposing new legislation he hopes will make it reality.

Sen. Ray Lesniak said his bill would repeal any laws in New Jersey that prohibit sports betting at casinos and racetracks.

"Sports leagues and the Justice Department say we have to repeal our laws, and then we're free to start taking bets," he said. "And that's what it does."

Saying it "certainly will pass both houses in a heartbeat," Lesniak, D-Union, said he believes the measure will be enacted within a couple of weeks- and that Gov. Chris Christie will sign it.

His bill addresses a Christie administration concern by prohibiting anyone under 21 from making a sports wager.

Assembly Gaming and Tourism Committee chairman Ralph Caputo said Tuesday he anticipates his committee will advance the bill this week.

"We want to give the racetracks a shot in the arm. We want to help Atlantic City. We want to do some-

thing for the gaming business in the state of New Jersey, which has been under tremendous duress from the closings, which occurred down in Atlantic City," said Caputo, D-Essex. "So this is a good move."

The NCAA and professional leagues have complained the state's efforts are a legal end-run around federal law prohibiting sports betting in all but four states.

Kyrillos and Lesniak Fast Track Sports Betting Legislation

Sen. Joe Kyrillos

Senators Joe Kyrillos (R-Monmouth) and Ray Lesniak have teamed up to sponsor legislation that will counter the professional sports leagues latest attempts to block sports betting in New Jersey.

The bill, which will be introduced during the Senate's next session, would explicitly abolish language in state law that prohibits sports betting, a move that would reinforce the state attorney general's effort to lift the injunction preventing the state from moving forward on plans to allow casinos and racetracks to accept wagers on sporting events. The measure would also prohibit the transport of sports-betting equipment across state lines and set an age requirement of 21 years old.

Last month acting Attorney General John Hoffman issued a directive that instructed law enforcement not to prosecute sports betting at racetracks and casinos. The Christie Administration asked U. S. District Judge Michael Shipp to rule that New Jersey is not violating federal law by decriminalizing sports betting and allowing private entities to operate and regulate the betting.

The four major sports leagues and the NCAA opposed the Christie Administration's motion, claiming that "The ... authorization of sports gambling in New Jersey would irreparably harm amateur and professional sports by fostering suspicion that individual plays and final scores of games may have been influenced by factors other than honest athletic competition."

Removing the state law prohibiting sports betting from the books will give New Jersey's legal position

more authority and will help withstand any more challenges, Lesniak said.

"The Atlantic City casino closings and job losses underscore the importance of getting this done as soon as possible," said Senator Lesniak. "Sports betting will be a lifeline to the casinos, putting people to work and generating economic activity in a growth industry."

"The horseracing industry is more than a business for New Jersey, it is a key part of our way of life," said Senator Kyrillos. "The racetracks provide jobs and economic activity, but they also support horse farms and

open space. Sports wagering is a natural fit with the racetracks."

The bill is modeled after the Lesniak-sponsored measure vetoed by the governor before Senator Lesniak developed the legal strategy of removing the state ban. Senator Lesniak identified the opinion by the Federal Court's Third Circuit was an "open invitation" for New Jersey because it stated that it would not violate the federal ban on sports betting since that ban only applies to "state authorized" wagers.

Monmouth Park - The Shore' s Greatest Stretch

News

Monmouth Park to Start Sports Betting October 26

Friday, October 17, 2014

Oceanport, N.J. - Monmouth Park Racetrack will begin offering and accepting wagers on sporting contests and athletic events on Sunday, Oct. 26 at the racetrack.

"We thank Governor Christie for his leadership on this issue," said Dennis Drazin, advisor to Darby Development LLC, operators of Monmouth Park.

"The New Jersey horse racing industry and the associated agriculture support services is a $1 billion industry and is responsible for 13,000 jobs in the Garden State, as well as the open spaces and green acres that are the direct result of horse racing," Drazin said. "The Governor's signature on S2460 earlier today is a wire-to-wire winner for horse racing, the gaming industry and the people of New Jersey."

In 2011, Garden State voters made it clear that they no longer wanted New Jersey laws that made it illegal to engage in sports betting at Atlantic City casinos and at New Jersey racetracks. After two years of litigation in the federal courts, a definitive interpretation as to the scope and meaning of the Professional and Amateur Sports Protection Act (PASPA) was handed down. In that decision, the Court stated that it does "not read PASPA to prohibit New Jersey from repealing its ban on sports wagering." The Court went on to state that "it is left up to each state to decide how much of a law enforcement priority it wants to make

of sports gambling, or what the exact contours of the prohibition will be."

Following a vote in the New Jersey Senate of 27-1 on Oct. 14 and in the General Assembly of 73-4, the Governor affixed his signature to S2460, thus paving the way for sports betting at Atlantic City casinos and New Jersey's racetracks to commence immediately.

"I want to express our thanks and gratitude to the entire New Jersey Legislature," said Drazin. "Particularly to Senator Lesniak, who has championed this cause from the onset and Assemblyman Caputo, who led the legislation through the Assembly. Also, the tireless work of Senators Kyrillos, Beck and Whelan as well as Assemblymen Dancer, Burzichelli, Mazzeo and Mukherji have brought us to where we are today. We can't wait to welcome new fans to the racetrack as we embark on this exciting new era in the long and storied history of Monmouth Park."

NorthJersey.com

NJ Sen. Lesniak to create sports betting bell for racetracks, casinos

May 19, 2014

BY JOHN BRENNAN

STAFF WRITER, THE RECORD

State Sen. Ray Lesniak, D-Union, on Monday announced at the East Coast Gaming Conference in Atlantic City that he is preparing a bill to allow for private operation of sports betting at the state's racetracks and casinos - threatening to call the bluff of the federal government regarding sports betting.

Lesniak spearheaded legalization of online gaming in the state as well as its challenge of a federal law now negating the state's sports betting law. He said he will move forward on the bill in the Legislature should the U.S. Supreme Court decline to hear the slate's case next month.

"Right now, book your hotel room [in Atlantic City]] for the Super Bowl next year and the NCAA Final Four, because you won't be able to get one," Lesniak declared. We are going to have sports betting in New Jersey next year. Go to the bank on it. because if the [Supreme Court takes the case], it will be overturned.

"And if it isn't, it's the position of the Justice Department in their briefs that they are not stopping states," but telling those states they're free to stop preventing such betting without officially sponsoring it, he added, "I have legislation being drafted, and that will be introduced, to allow casinos and racetracks, to have sports betting on our premises. We just won't be

able to regulate it. We pushed the envelope with internet gaming, and we will push the envelope on sports betting. And we are not going to be deterred."

The U.S. Department of Justice is defending the legality of the Professional and Amateur Sports Protection Act of 1992 (PASPA) that bars slate-sponsored betting in all but four states. Last week it reiterated its contention that the law is not unconstitutional because it merely prevents the sort of state-sponsored sports betting that New Jersey's current state law is meant to offer.

The federal government and the NCAA, the NFL, and three other professional sports leagues last year prevailed at the U.S. District Court and Third Circuit Court of Appeals levels. That has led Governor Christie to make a final appeal for the U.S. Supreme Court to hear the ease – a decision that likely would be made next month.

But Lesniak's bill would keep the issue on the front-burner even if the nation's highest court. declines to hear the case.

At the Third Circuit court in Philadelphia last June, U.S. Attorney Paul Fishman argued the federal government's case. Fishman, stressing the point that the PASPA law is not an example of prohibited "commandeering" of state conduct, noted that New Jersey officials could, if they chose to, announce that the state would no longer enforce its sports betting laws,

"It would be a really, really had idea," Fishman said, but it would not be prohibited by the 1992 sports betting law that allows only Nevada and three other states to offer sports betting.

The Department of Justice's most recent filing contends that even if the court questioned the federal

law's prohibition against sports betting, that law also prohibits private operators from offering such gambling. The state has countered that if the main provision is not legitimate, the entire law tear need to be struck down.

Meanwhile, New Jersey's somewhat uneven results for online gaming since it was legalized last November was defended by numerous industry experts.

Richard Schuetz, chairman of the California Gambling Control Commission, said that criticism of the state's results was like parents complaining that their 5-month-old baby "doesn't speak any languages."

Gaming law attorney Jeff Ifrah later continued the theme: "This baby is walking and talking, and is going be doing that very well for the rest of its life."

Borgata CEO Tom Ballance said that New Jersey's nine-month journey from legalization to going live with online gaming is "like trying to paint an airplane while it's flying."

State Division of Gaining Enforcement Director David Rebuck said: "Internet gaming exists in all 50 states. It's just unregulated" in 47 of them, with only New Jersey, Nevada and Delaware offering a legal version of the betting.

Sen. Raymond J. Lesniak/ Sports betting fight must continue

Posted 3 months ago

The fight to bring sports betting to New Jersey has been long and challenging, complete with obstacles and strong resistance, primarily from the well-financed and powerful efforts of the professional sports organizations, the NCAA and casino operators in other states who have an interest in preserving the status quo. We have encountered setbacks in the courts, political opposition and the army of lobbyists employed by those who don't want to allow New Jersey to establish a sports betting industry that is profitable to the gaming industry already in place in Atlantic City and at our racetracks.

Some have gotten discouraged by the protracted effort and some have given up the fight. I haven't. I continue to pursue what some now consider a "Quixotic quest" to make sports betting legal in New Jersey because I believe we should have the legal right and because it will be good for the struggling casinos, good for Atlantic City's future and good for New Jersey's economy. It will bring jobs, more commerce and economic activity.

Measuring the financial activities that surround some of our biggest sporting events provides evidence of the benefits that could be drawn to Atlantic City. The Super Bowl, the Final Four and even World Cup soccer generate a level of fan interest and sports wagering that could be a game-changer for Atlantic City. During these sporting events, you can't get a room in a Las Vegas hotel where sports betting is allowed, but Atlantic City is a ghost town. This is a $500 billion-a-year industry, but the money is going to

Nevada, to offshore betting sites and to organized crime. Sports betting is going on, but it isn't sanctioned in New Jersey and the profits are going elsewhere.

Legalizing sports wagering recognizes the inevitable - that people are going to bet on sports, whether the practice is legal or not, and that we should provide a safe and legal avenue for them to bet on their favorite teams. By mainstreaming sports wagering, we can take some of the power away from organized crime and offshore Internet operators, and put it in the regulated hands of existing casino and racetrack operators. And we can create new jobs and new economic opportunities for our ailing gaming establishments.

What's more, our society already gives tacit approval to sports wagering. Don't believe me? Open to the sports pages of any newspaper in states that do not allow for legal sports betting, and you'll see terms like "covering the spread," "the line ," or "the over/under" - terms that oddsmakers use to set the parameters on sports wagers.

Recently, the U.S. Supreme Court denied our appeal to reverse the Third Circuit Court of Appeals decision that federal law precluded New Jersey from making sports betting legal. But it strangely stated that the federal law does not preclude us from repealing our laws that make sports betting illegal in New Jersey. Go figure, but the Justice Department stated the same in its brief to the court.

That's exactly what my legislation does. It passed both the Senate and Assembly, overwhelmingly supported by Democrats and Republicans from throughout all parts of New Jersey.

Lawyers involved on our behalf have recommended this approach. The Justice Department would be hard pressed to take any action that followed its own words and was also expressed in the Third Circuit opinion. And the NFL and other sports leagues opposed to sports betting outside of Nevada would not have standing to challenge it.

In any event, we should not give up. Monmouth Racetrack is geared up and will start taking sports bets in September at the start of the NFL season if Gov. Chris Christie signs my legislation. Revel should do likewise. It has nothing to lose. Neither does the State of New Jersey, but we have a lot to gain.

State Sen. Raymond J. Lesniak is a Democrat representing the 20th Legislative District in Union County.

SENATE BILL NO. 2250

To the Senate:

Pursuant to Article V, Section I, Paragraph 14 of the New Jersey Constitution, I am returning Senate Bill No. 2250 without my approval.

Since the earliest days of my Administration, I have demonstrated my firm commitment to reversing the trend of economic contraction in the State's gaming industry. Together with the Legislature, my Administration has acted boldly to revitalize the gaming industry and to set a new course for economic growth and job creation in this critically important sector of our economy. From the historic establishment of a Tourism District in Atlantic City to expanded wagering opportunities at casinos and racetracks, including the implementation of one of our nation's first Internet gambling laws, I have consistently pursued new and innovative ways to make New Jersey a more competitive gaming jurisdiction and to enhance the financial viability of the State's gaming industry.

Consistent with these efforts, I signed into law legislation authorizing sports wagering at casinos and racetracks in January of 2012. This action followed the passage of a voter-approved Amendment to the State Constitution permitting sports wagering at these venues. These efforts were immediately met with resistance from the four major professional sports leagues and the National Collegiate Athletic Association, who brought suit alleging conflict between New Jersey's sports wagering law and the federal Professional and Amateur Sports Protection Act ("PASPA").

As has been well chronicled, the plaintiffs in this legal battle prevailed in a federal trial court in their

efforts to prevent New Jersey casinos and racetracks from lawfully offering sports betting opportunities, under carefully prescribed rules, to their patrons. As has also been well chronicled, the State, at my direction, appealed that decision to the United States Court of Appeals for the Third Circuit, which agreed with the trial court, and then again to the United States Supreme Court, which declined to take up the State's case. Thus, after a spirited legal effort, the Third Circuit's opinion that PASPA prevents the implementation of New Jersey's sports wagering law represents the binding and final judicial interpretation of federal law. While I do not agree. with the Circuit Court's conclusion, I do believe that the rule of law is sacrosanct, binding on all Americans. That duty adheres with special solemnity to those elected officials privi'leged to swear an oath to uphold the laws of our Nation.

In a novel attempt to circumvent the Third Circuit's ruling, this bill states that all prohibitions against wagering on the results of any professional, college, or amateur sport or athletic event, set forth in State law would no longer apply to wagering at casinos or racetracks in this State. In essence, this bill partially deregulates betting at casinos and racetracks in an effort to sidestep federal law. While I suppOrt the intentions of the Legislature to continue our shared conunitment to enhancing the economic viability of our gaming industry, I cannot sign this bill, which was introduced on the same day the Supreme Court declined to hear our appeal, and then was rushed to final passage just three days later. Ignoring federal law, rather than working to reform federal standards, is counter to our democratic traditions and inconsistent with the Constitutional values I have sworn to defend and protect.

While I remain open to exploring legally sound ways to let the State's casinos and racetracks offer sports wagering, I am mindful that this process takes time. As the sponsors point out, the Third Circuit's opinion may not have foreclosed all legal avenues for permitting sports wagering within the State. Now that the Supreme Court has made clear that it will not be taking the case, the time is right to examine the Third Circuit's opinion carefully and determine if a different approach towards sports wagering would comply with federal law, and further whether this new approach would be in the best interests of the State. In the meantime, we must respect the rule of law and the decisions of our courts.

Accordingly, I herewith return Senate Bill No. 2250 without my approval.

Respectfully,

/s/ Chris Christie

Governor

[seal]

Attest:

/s/ Paul B. Matey

Deputy Chief Counsel to the Governor

LAW ENFORCEMENT DIRECTIVE 2014-1

FORMAL OPINION 1-2014

TO: Elie Honig, Director
New Jersey Division of Criminal Justice

All County Prosecutors

All Municipal Prosecutors

Joseph R. Fuentes, Superintendent
New Jersey State Police

All County Sheriffs

All Police Chief Executives

David L. Rebuck, Director
New Jersey Division of Gaming Enforcement

Frank Zanzuccki, Executive Director
New Jersey Racing Commission

Jeffrey S. Jacobson, Director
New Jersey Division of Law

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Because New Jersey Senate Bill 2460, signed into law by the Governor on October 17, 2014, repeals the Sports Wagering Act in its entirety, Law Enforcement Directive 2014-1 and Formal Opinion 1-2014 are now moot and no longer effective.

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FROM: John J. Hoffinan, Acting Attorney General

SUBJECT: Law Enforcement Directive to Ensure Uniform Enforcement of the Sports Wagering Act's Exemption from Criminal Liability for the Operation of Sports Pools by Casinos and Racetracks

Formal Opinion Addressing the Effects of Law Enforcement Directive 2014-1 on the Sports Wagering Act's Exemption from Civil Liability for the Operation of Sports Pools by Casinos and Racetracks

DATE: September 8, 2014

LAW ENFORCEMENT DIRECTIVE 2014-1

On November 8, 2011, the citizens of New Jersey voted overwhelmingly to amend the New Jersey Constitution to permit the Legislature to repeal prohibitions against the operation of sports pools by casinos and racetracks. Thereafter, Governor Christie signed the Sports Wagering Act, N.J.S.A. 5:12A-1 to -6, to effectuate the will of the people expressed in the constitutional referendum. That statute decriminalized the operation of sports pools by casinos and racetracks, and implemented an extensive licensing and regulatory regime. Those regulations are codified in N.J.A.C. 13:69N-1.1 et seq.

Certain sports leagues claimed that the State's implementation of the Sports Wagering Act violated the federal Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. 3701 et seq. They brought suit in federal court to enjoin the implementation of the Sports Wagering Act. Governor Christie and the other defendants argued that PASP A violated the federal constitution and therefore could not be enforced. The federal district court ruled in favor of the plaintiff sports leagues and, in accordance with PASPA, enjoined the State from licensing or authorizing sports wagering.

Governor Christie and the other defendants appealed to the United States Court of Appeals for the Third Circuit. In September 2013, that court upheld the constitutionality of PASP A on the basis that it

does not require States to maintain existing laws and thus does "not prohibit New Jersey from repealing its ban on sports wagering." N.C.A.A. v. Governor of the State of New Jersey, 730 F.3d 208,232 (3d Cir. 2013), cert. denied, __ U.S. __ (2014) (hereinafter "N.C.A.A. v. Governor" or "Third Circuit opinion"). In holding that New Jersey "may repeal its sports wagering ban," id. at 233, the Third Circuit accepted the positions of the plaintiffs in the case, who had argued that the statute was constitutional because "nothing in [P ASP A) requires New Jersey to maintain or enforce its sports wagering prohibitions," and, indeed, that New Jersey's "repeal of its state-law prohibition on the authorization of sports wagering" itself was "in compliance with PASPA." Br. of the United States ("U.S. Br."), No. 13-1713 (3d Cir.) at 28-29; Br. of Leagues ("Leagues Br.") No. 1713 (3d Cir.) at 16.

The specific issues addressed in this Law Enforcement Directive are whether, in light of N.C.A.A. v. Governor, casinos and racetracks would be committing a criminal offense under New Jersey law if they were to operate sports pools as part of their business activities.

The New Jersey Code of Criminal Justice (Title 2C) provides that when determining whether their conduct constitutes a criminal offense, persons may rely on "an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense." N.J.S.A. 2C:2-4(c)(2). Pursuant to the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 et seq., the Attorney General serves as the State's criminal law enforcement officer, and is required to ensure the uniform and efficient enforcement of the criminal law and administration of criminal justice.

The Attorney General ultimately is responsible for the enforcement of our State's criminal laws, including our gambling laws, and therefore is the public officer best suited to interpret the Sports Wagering Act and its relationship to Title 2C in view of the Third Circuit opinion. Given the importance of the issues raised by that opinion, it is appropriate to issue clear and authoritative guidance on whether casinos and racetracks are prohibited by our criminal law from operating sports pools, or whether the provisions of the Sports Wagering Act that exempt casinos and racetracks from criminal liability remain in effect.

For the following reasons, sports pools operated by casinos or racetracks continue to be exempted from criminal liability under New Jersey law so long as no wagering occurs on a college sport or athletic event that takes place in New Jersey or in which any New Jersey college team participates regardless of where the event takes place. See N.J. Const., art. 4, sec. 7, par. 2E and F. Accordingly, no law enforcement or prosecution agency or officer shall, pursuant to N.J.S.A. 2C:37-1 to -9, make an arrest, file a complaint against, or prosecute any person[1] involved in the operation of a sports pool by a casino or racetrack to the extent that such activity takes place consistent with this Law Enforcement Directive.

Title 2C expressly provides that "no conduct constitutes an offense unless the offense is defined by this code or another statute of this State." N.J.S.A. 2C:1-5. Criminal statutes establish the scope of criminal lia-

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[1] The New Jersey Code of Criminal Justice defines "personn to include any natural person and, where relevant, a corporation or an unincorporated association. N.J.S.A. 2C:1-14(g).

bility not only by defining the material elements of offenses, see N.J.S.A. 2C: 1-13(h), (i), but also by creating exemptions or affirmative defenses. In the specific context of gambling, chapter 37 of Title 2C establishes a comprehensive suite of criminal offenses that generally prohibit all persons from promoting gambling or engaging in gambling activity, subject to certain exceptions. See, e.g., N.J.S.A. 2C:37-l(c); N.J.S.A. 2C:37-9.

The Sports Wagering Act, however, provides that "[i]n addition to casino games permitted pursuant to the provisions of P.L.1977, c.110 (C.5:12-1 et seq.) [the Casino Control Act], a casino may operate a sports pool...." N.J.S.A. 5:12A-2(a). It further provides that, "[i]n addition to the conduct of pari-mutuel wagering on horse races under regulation by the racing commission pursuant to chapter 5 of Title 5 of the Revised Statutes, a racetrack may operate a sports pool...." Id. In this manner, the Sports Wagering Act repealed the prohibition against the operation of sports pools by casinos and racetracks, thus exempting those activities from criminal prosecution under New Jersey law. The issue, then, is whether that exemption is consistent with the Third Circuit's ruling. The answer to that question is found in the text and reasoning of the Third Circuit opinion, as well as the concessions made by the plaintiffs in that case.

The Third Circuit made clear that it did "not read PASP A to prohibit New Jersey from repealing its ban on sports wagering." 730 F .3d at 232. The Court reached this conclusion based on the arguments of the sports leagues, which stated that "[n]owhere in its unambiguous text does PASPA order states to keep laws on their books," or "to keep existing laws in effect." Leagues Br. at 16. The United States Department of

Justice, which had intervened in the case to defend PASPA's constitutionality, joined in the leagues' arguments, stating that "nothin in the statute requires New Jersey to maintain or enforce its sports wagering prohibitions," and that "PASPA also allows a state to ... modify or repeal its prohibitions." U.S. Br. at 29. Summarizing and accepting those arguments, the Third Circuit noted that "no one contends that P ASPA requires the states to enact any laws, and we have held that it does not require states to maintain existing laws." 730 F.3d at 235. Indeed, the United States Constitution clearly forbids Congress from requiring a State to criminalize conduct wider state law. As the Third Circuit observed, "Congress 'lacks the power directly to compel the States to require or prohibit' acts which Congress itself may require or prolu"bit." Id. at 227 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).

That federal courts have found the licensing regime of the Sports Wagering Act to be preempted by PA SPA does not invalidate the Sports Wagering Act's repeal of prolu"bitions against the operation of sports pools by casinos and racetracks. Recognizing that the Sports Wagering Act might be challenged under PASPA, the Legislature included a "severability clause" in its statute:

> If any provision of this act, P.L. 2011, c. 231 (C.5:12A-1 et al), or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

[N.J.S.A. 5:12-2(g).]

The Legislature therefore intended for the provisions of the statute that are not directly invalidated to continue in force and effect. Here, as the Third Circuit made clear, and as the sports leagues and the Department of Justice conceded, PASPA does not prohibit States from repealing state-law prohibitions on sports wagering. The Sports Wagering Act's repeal of prohibitions against sports wagering in casinos and racetracks can be given effect without licensing or otherwise authorizing by law sports wagering, as prohibited by the Third Circuit's decision, and, accordingly, mustbegiveneffect. N.J.S.A. 1:1-10.

For the foregoing reasons, it is the view of the Attorney General that, at least, the provisions of the Sports Wagering Act exempting casinos and racetracks from criminal liability for operating a sports pool—specifically, N.J.S.A. 5:12A-2(a), which states that "a casino may operate a sports pool" and that "a racetrack may operate a sports pool," in accordance with how those terms are defined in N.J.S.A. 5: 12A-1—remain in force and effect, and all law enforcement and prosecuting agencies in carrying out their duties under the laws of the State of New Jersey shall abide by that exemption.

Any questions concerning this Law Enforcement Directive shall be addressed to the Director of the Division of Criminal Justice.

FORMAL OPINION 1-2014

The issue also has arisen regarding what effect the above Law Enforcement Directive bas on the civil proscriptions applicable to sports wagering. See N.J.S.A. 2A:40-l to -9. It is the Attorney General's statutory role to "[a]ct as the sole legal advisor" of, and

to "interpret all statutes and legal documents" governing, state agencies. N.J.S.A. 52:17A-4(e).

As explained in the above Law Enforcement Directive, the Sports Wagering Act provides that a casino or racetrack "may operate a sports pool." Accordingly, sports pools operated by casinos and racetracks are exempted from criminal liability so long as no wagering occurs on a college sport or athletic event that takes place in New Jersey orin which any New Jersey college team participates regardless of where the event takes place. For the same reason, sports pools operated by casinos and racetracks are exempted from the civil proscriptions of Title 2A, chapter 40, so long as no wagering occurs on a college sport or athletic event that takes place in New Jersey or in which any New Jersey college team participates regardless of where the event takes place. Accordingly, 1 hereby instruct that the Department of Law and Public Safety shall not object to or seek civilly to enjoin a sports pool operated by a casino or racetrack to the extent that it is conducted in a manner consistent with this Formal Opinion.

Any questions concerning this Formal Opinion shall be addressed to the Director of the Division of Law.

John J. Hoffinan

Acting Attorney General

Dated: September 8, 2014

c. Christopher S. Parrino, Chief Counsel to the Governor

Lee V artan, Executive Assistant Attorney General

Deborah R. Edwards, Counsel to the Attorney General

Sports betting bill heads to Christie's desk after Assembly approval | NJBIZ

Sports betting bill heads to Christie's desk after Assembly approval

October 16. 2014 3:01PM

The Assembly resoundingly voted 73-4 in favor of legislation Thursday that would lift the state's ban on sports betting and effectively pave the way for casinos and racetracks to begin taking wagers on games.

The sports betting bill has been approved and is heading to Christie's desk.

The bill, which received nearly unanimous Senate approval on Tuesday, will now head to Gov. Chris Christie's desk for consideration.

"Everyone recognizes the problems of Atlantic City and the racetracks," Assemblyman Ralph Caputo (D-Belleville), the bill's sponsor in the Assembly, said. "This would be a tremendous boost and a historic move for the state of New Jersey to permit that kind of activity here."

Supporters of the measure believe it helps to reinforce the directive issued last month by acting state Attorney General John Hoffinan permitting casinos and racetracks to begin offering sports wagering without fear of prosecution.

While the four major professional sports leagues and the NCAA have since filed a motion to block the state from following through on the directive, lawmakers believe the legislation will work to strengthen the state's legal position.

The legislation is the centerpiece of the latest push by the state to usher in sports wagering after

losing a roughly two-year legal effort to overturn the Professional and Amateur Sports Protection Act, a federal law that limits sports betting to just four states excluding New Jersey.

The latest bill imposes an age requirement of 21 on those wishing to participate in sports betting and mandates that wagers on games played within the state or those that involve state-based colleges and universities are prohibited. Also outlawed in the legislation is the transport of sports betting equipment across state lines.

It remains unclear if and when Christie will sign the bill. Despite appearing in line with the directive issued by Hoffman, the legislation is nearly identical to a measure that Christie vetoed in August on the grounds that he felt federal law was "sacrosanct."

State Sens. Ramyond Lesniak (D-Union) and Joe Kyrillos (R-Middletown), both primary sponsors of the bill in the Senate, issued a joint statement following the Assembly vote urging Christie to sign the measure.

"We are a short step away from getting this done and a lot closer to bringing sports betting to New Jersey," Lesniak said. " It's been a long, tough effort and we've gone up against powerful interests, but now there is an urgency because sports gaming will be a lifeline to the Atlantic City casino industry at a critical time. It will produce jobs, generate economic activity and be a long-term benefit to New Jersey. I urge the governor to sign it into law as fast he can."

"Sports betting can assist New Jersey's struggling casino industry and with our challenges at Monmouth Park Racetrack," Kyrillos said. Both houses of the Legislature acted quickly to approve this critical

measure and I am confident Governor Christie will join our efforts to help protect Atlantic City and Monmouth Park jobs by signing the bill into law."

Interview with Senator Ray Lesniak: Legal sports betting coming to New Jersey in 2014

September 12, 2014

After all the promising sports betting news coming out ofNew Jersey this week, we caught up with New Jersey State Senator Raymond Lesniak, a champion of bringing sport betting and online gambling into New Jersey, to find out exactly when we can expect legal sports betting to arrive in his state.

Becky Liggero: Thank you for joining me, Senator. In just one month's time, Chris Christie changed his view on Sports Betting in the state of New Jersey and authorized it, what triggered this complete 180?

Senator Lesniak: Two things - the tragedy of casinos closing every week and over 8,000 people out of work - sports betting will give the opportunity for those folks to get back to work. I believe that Revel and Showboat, which have closed down, will reopen if we get them sports betting.

I've been saying this for many years now with this struggle, Las Vegas during Super Bowl week, NCAA tournament, any big sporting event, you cannot get a room and Atlantic City is a ghost town. So Governor Christie felt the heat and felt the footsteps of that as well as my campaign to override his veto of my legislation.

Anybody can change their mind, I don't care, the reason why doesn't matter, but we are back on track. I have new legislation, very similar to the one he vetoed. I believe he'll sign it this time and we'll soon be up and running and be able to take sports bets and bring some life into Atlantic City and our racetracks and bring those jobs back.

BL: We have a date coming up, October 6th, we're looking for a ruling from Michael Shipp, how will your new bill impact on this date?

Senator: It will have great impact because I believe we would Jose without it.

What the Attorney General is now saying is that my original legislation that Shipp enjoined, that he didn't enjoin the part of it that repealed our laws prohibiting sports betting at our casinos and racetracks. The problem is, that's not what my law said, he's saying it implicitly repealed it. I don't believe that argument will succeed. Because it's one thing to say the state can license sports betting at our racetracks and casinos, it's another thing to say, go right ahead and do it, we don't have any Jaws against it. So I think right now he has a losing argument.

I'm glad he brought it to the forefront though because we will now pass new legislation, very similar to the one the Governor vetoed, and once we get that done, we're going to win in court.

BL: We have the leagues who have been fighting against sports betting in New Jersey, what do you think their response is going to be to an this progress that you're making and to these biJJs that you're trying to get passed?

Senator: First of all, they've already responded. They've asked for Dennis Drazin of Monmouth racetrack to stand down for 45 days so they can get their act together.

And I believe - my opinion only - but based on what I heard from the NBA Conunissioner that sports betting is inevitable, that we just want a piece of the action. I believe that ultimately will be the result, and that they'll get a franchise fee for use of their official

statistics, and that New Jersey will not only be the first state, but will be only one of many that will follow our footsteps and use this as a template for going forward. We've already received inquiries from other states in terms of looking and expecting us to succeed and they'll follow along.

BL: So we've got the Monmouth racetrack that is ready to pun the trigger, what do you think it's going to take for other casinos and racetracks to fonow the footsteps of Monmouth?

Senator: I think it's going to take the judge's decision. I have no faith in our casinos, our casino operators are timid, they're one of the reasons why we have so many closures, they have given virtually no support for internet gaming and now for sports betting, but we're going to show them the way despite themselves. We're going to help them come back to life.

Thanks to Dennis Drazin for having the courage and the fortitude to move forward because he knows that his industry, the horse-racing industry that employs thousands of people in New Jersey and their horse farms provide great open space in Monmouth and Ocean County. He's really been the vanguard and the lightening rod – I would not be able to succeed without him moving forward.

BL: Have you had any discussions with William Hill US about the racetrack?

Senator: Only through Dennis Drazin and they're courageous as well, but not as courageous as Dennis, so they're going to wait until the judge rules and I understand that. But regardless, I have a commitment that I'll place the first bet and I'm looking forward to it.

BL: Excellent. And are you stin staying that we better book our rooms now for the Super Bowl?

Senator: Absolutely. Soon every single room in Atlantic City will be all booked up for the Super Bowl.

BL: This is great, and if you had to make a prediction of when you think we're actuany going to see sports betting in the state of New Jersey, when is it going to be?

Senator: 44 days from now. Yesterday I said 45 days. That's how long the sports leagues have asked Monmouth racetrack to stand down to give them time but they're not going to stand down any longer and either am I.

BL: Is there anything else that you wanted to add Senator?

Senator: No, other than this has been a five-year battle, David vs. Goliath (they're David, I'm Goliath) but the result is going to be that we're going to win and thank God because those employees are out of work in Atlantic City and the jobs that are threatened at our racetracks are going to be saved. And that's the great thing about all of this.

BL: This is great, and Senator thank you so much for your time, I really appreciate it.

Senator: It's my pleasure, have a great day.

Views And Opinions Expressed Are Those Of The Author And Do Not Necessarily Reflect Those Of CalvinAyre.com

Senate Approves Sports Betting Bill I New Jersey News, Politics, Opinion, and Analysis

Senate Approves Sports Betting Bill

BY RMCGRATH AT 10/14/14 1:58PM

TRENTON - Acting to remove legal obstacles in the effort to bring sports betting to New Jersey, the Senate on Tuesday approved legislation sponsored by Senator Raymond Lesniak (D-Union), Senator Jim Whelan (D-Atlantic) and Senator Joseph Kyrillos (R-Monmouth) that would explicitly remove language in state law that currently prohibits wagering on sporting events. The move would reinforce the state attorney general's attempt to lift the court injunction preventing the state from moving forward on plans to allow casinos and racetracks to offer sports betting.

"This could put New Jersey at the forefront of an industry with great potential for job creation and economic growth," said Senator Lesniak. "The Atlantic City casino closings and Job losses underscore the importance of getting this done as soon as possible. It could be a lifeline to the casinos, putting people to work and generating economic activity in a growth industry "

The four sports leagues and the NCAA filed a motion in court in an attempt to prevent the New Jersey attorney general from following through on its directive to not enforce the state's law prohibiting sports betting. Removing the law from the books will give our legal position more authority and will help withstand any more challenges, Senator Lesniak said.

The measure would prohibit the transport of sports-betting equipment across state lines, set an age requirement of 21 years old, and prohibit betting on

athletic contests in the state or involving New Jersey colleges

"As Atlantic City rebounds from the traumatic effect of casino closings sports betting could be one of the best and more immediate opportunities to rebuild the city 's economy." said Senator Whelan. "Gaming will always be an important part of our attractions and sports betting will expand on it This is good for Atlantic City, for the casino industry and the state."

http://politickernj.com/2014/10/senate-approves-sports-betting-bi!V 10/20/2014

The gaming activity would also be allowed at state racetracks. helping to rejuvenate a historically important sector that is also experiencing hard times. Senator Kyrillos said.

"New Jersey's continued prohibition on sports betting at our casinos and racetracks is contrary to our interest of supporting employers that provide tens of thousands of jobs and add billions to our state's economy," said Kyrillos "Sports betting will help set New Jersey's wagering facilities apart from the competition and strengthen Monmouth Park and our struggling casino industry."

New Jersey voters approved a non-binding referendum authorizing sports betting by a 2-1 margin in 2011

The bill, S-2460,which was approved 27 - 1, is modeled after the Lesniak-sponsored measure vetoed by the governor before Senator Lesniak developed the legal strategy of removing the state ban. Senator Lesniak identified the opinion by the Federal Court's Third Circuit as an "open invitation" for New Jersey because it stated that it would not violate the federal

ban on sports betting since that ban only applies to "state authorized" wagers.

* * *

THE INDEPENDENT SPORTS WAGERING ASSOCIATION

MEMBERSHIP AGREEMENT

THIS MEMBERSHIP AGREEMENT, dated as of the _____ day of October, 2014 (hereinafter, this "Agreement"), by and among Monmouth Park Racetrack (the "Original Member") and each individual and entity becoming party to this Agreement hereafter (each, an "Additional Member");

Recitals:

WHEREAS, each Original Member desires to enter the business of accepting wagers on professional, collegiate, and amateur sporting events (the "Business"); and

WHEREAS, the Original Party recognizes that to promote the public interest and for the Business to succeed it must preserve the integrity of the sporting events upon which wagers are to be placed and adopted by establishing, through the creation of The Independent Sports Wagering Association ("TISWA"), rules to promote a safe, secure, and reliable sports wagering environment having a high level of consumer protection, as well as safeguards that protect the integrity of the sports contests and athletic events to be wagered on, including fair and just procedures for the resolution of disputes;

NOW, THEREFORE, the Original Member and each Additional Member becoming a party to this Agreement pursuant to Section 9 agree as follows:

1. **Responsible Gaming and Betting.** The Original Member and each Additional Member (each, a "Member") will provide customers with detailed information regarding the risks and harms of gaming and information about qualified sources of help for persons with gambling problems. Each Member will also establish standard procedures to mitigate potential harms caused by gambling, such as not providing credit and establishment of pre-set gambling limits.

2. **Preventing Underage Betting.** Each Member will establish procedures to prevent betting by persons under the age of 21.

3. **Fraudulent and Criminal Behavior.** Each Member will establish procedures to identify and investigate suspicious activities and transactions.

4. **Protection of Consumer Information**. Each Member will protect customer financial and other personal information.

5. **Customer Payments.** Each Member will promptly process payments to customers.

6. **Marketing.** Each Member will take all appropriate measures to ensure that all marketing materials are accurate and do not convey misleading information .

7. **Customer Satisfaction.** Each Member will give its customers the opportunity to register complaints regarding the Member's conduct of the Business and will establish internal procedures for the resolution of disputes.

8. **Internal Enforcement.** The Members will establish internal enforcement measures to ensure the compliance with this Agreement by each Member.

9 **Additional Members.** Any individual or entity seeking to join TISWA and become an Additional Member shall submit an application to all then-existing Members and, upon approval of such application, shall execute a counterpart of this Agreement evidencing its agreement to become a Member of TISWA and to be bound by the terms hereof.

10. **Assignment and Parties Bound by Agreement.** Absent the express prior written consent of each other Member, the rights and obligations of any Member may not be assigned in any way whatsoever and any such attempted assignment shall be void and of no force or effect. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, and to their respective heirs, executors, administrators, successors, and permitted assigns.

11. **No Agency.** Each Member acknowledges and agrees that it will not hold itself out as an agent, partner, or co-venturer of any other Member and that this Agreement is not intended nor shall it be construed to create any business or other relationship between or among any two or more of the Members except as expressly set forth herein.

12. **Disassociation.** Any Member may disassociate itself from TISWA at any time immediately upon notice to each other Member.

13. **Notices.** Any notice or other communication required or which may be given hereunder shall be in writing and shall be delivered personally or sent by electronic mail, commercial overnight courier, or certified mail, return receipt requested and postage prepaid, and shall be deemed given when so delivered personally or, if sent by electronic mail, upon acknowledgment of receipt by the recipient or, if sent by commercial overnight courier, one (1) day after the date so sent or, if sent by certified mail, four (4) days after the date of mailing, to the parties at their respective addresses set forth below, any party, by notice given in accordance herewith to the other party or parties, being entitled to designate another address or person for receipt of notices hereunder.

14. **Counterparts.** This Agreement may be executed by the parties hereto by original, facsimile, or pdf signatures in one or more separate counterparts, each of which when so executed and delivered shall be an original but all such counterparts together constituting one and the same instrument.

[no further text this page; signature page(s) follow(s)]

IN WITNESS WHEREOF, the undersigned Original Party has executed this Agreement as of the date first above written and each undersigned Additional Member has executed a counterpart of this Agreement, as of the date hereof, as evidence of its agreement to become a Member of TISWA and to be bound by the terms hereof.

Original Party:

MONMOUTH PARK RACETRACK

By: _____
Print Name: _____
Title: _____
Notice Address: _____
_____
_____
Attention: _____
e-mail address: _____

* * *

* * *

[1]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, NATIONAL BASKETBALL ASSOCIATION, a joint venture, NATIONAL FOOTBALL LEAGUE, an unincorporated association, NATIONAL HOCKEY LEAGUE, an unincorporated association, and OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball,

Plaintiffs,

-vs-

CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission,

CIVIL ACTION NUMBER: 3: 12-cv-04947-MAS-LHG

Defendants,

-and-

STEPHEN M. SWEENEY, President of the New Jersey Senate, SHEILA Y. OLIVER, Speaker of the New Jersey General Assembly, and NEW JERSEY THOROUGHBRED HORSEMEN 'S ASSOCIATION, INC.,

Defendants-Intervenors.

Clarkson S. Fisher United States Courthouse
402 East State Street
Trenton, New Jersey 08608
February 14, 2013

[2]

BEFORE: HONORABLE MICHAEL A. SHIPP UNITED STATES DIS TRICT JUDGE

APPEARANCES:

ERIC H. HOLDEN, JR., UNITED STATES ATTORNEY GENERAL
BY: PAUL J. FISHMAN, ESQ., UNITED STATES ATTORNEY
and
JOHN ANDREW RUYMANN, ASSISTANT U.S. ATTORNEY
For the District of New Jersey.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, ESQUIRES
BY: JEFFREY MISHKIN, ESQUIRE
and
ANTHONY J. DREYER, ESQUIRE
Attorneys for the Plaintiffs.

McCARTER & ENGLISH, ESQUIRES
BY: WILLIAM J. O' SHAUGHNESSY, ESQUIRE
Attorneys for the Plaintiffs.

GIBSON, DUNN & CRUTCHER, ESQUIRES
BY: THEODORE OLSON, ESQUIRE
MATTHEW McGILL, ESQUIRE
JENNIFER NELSON, ESQUIRE
and
ROB JOHNSON, ESQUIRE
Attorneys for the Defendants.

JEFFREYS. CHIESA, ATTORNEY GENERAL FOR THE STATE OF NEW JERSEY

BY: JOHN J. HOFFMAN, ESQUIRE
Attorneys for the Defendants.

McELROY, DEUTSCH, MULVANEY & CARPENTER, ESQUIRES
BY: RONALD J. RICCIO, ESQUIRE
and
ELLIOTT BERMAN, ESQUIRE
Attorneys for the Intervenor Defendant.
GIBBONS, PC
BY: MICHAEL R. GRIFFINGER, ESQUIRE
and
THOMAS VALEN, ESQUIRE
Attorneys for the Intervenor Defendant.

Certified as True and Correct as required by Title 28, U.S.C., Section 753
/S/ Cathy J. Ford, CCR, CRR, RPR

[3]

MOTION

THE DEPUTY COURT CLERK: All rise.

THE COURT: Please be seated.

Well, good afternoon. We are here, and we are on the record, in the matter of the NCAA, et al versus Chris Christie, et al. Docket Number 12-4947.

May I have appearances of counsel, please.

MR. MISHKIN: Yes, your Honor. For the plaintiffs, Jeffrey Mishkin, Skadden, Arps, Slate, Meagher and Flom. With me is my partner, Anthony Dreyer. And our colleague is WilliamO' Shaughnessy of McCarter and English.

THE COURT: Welcome.

MR. O' SHAUGHNESSY: Good afternoon, your Honor.

MR. FISHMAN: Good afternoon, your Honor.

Paul Fishman, United States Attorney for the United States Intervenor. With me is Peter Phipps from the Department of Justice, Civil Division in Washington, and Jay Andrew Ruymann who is an Assistant U. S. Attorney in our Trenton office.

THE COURT: And welcome to you folks as well.

MR. OLSON: Theodore Olson, Gibson, Dunn & Crutcher, on behalf of the State of New Jersey. With me is Matt McGill, my partner, and my colleagues, Rob Johnson and Jennifer Nelson.

THE COURT: And welcome.

MR. HOFFMAN: John Hoffman, your Honor, on behalf of the State of New Jersey.

[4] THE COURT: Mr. Hoffman.

MR. RICCIO: Good afternoon, your Honor, Ronald Riccio for the New Jersey Thoroughbred Horsemen's Association, McElroy, Deutsch, Mulvaney & Carpenter. With me is Elliott Berman from my firm.

THE COURT: Welcome. Good to see you.

MR. GRIFFINGER: Good afternoon, your Honor, Michael Griffinger and Tom Valen from Gibbons on behalf of Stephen Sweeney and Sheila Oliver of the legislature of the State of New Jersey.

THE COURT: Okay. Good to see you folks as well.

Well, folks, we're here today for oral argument with regard to the singular issue of the constitutionality of the PASPA statute. The Court has reviewed the parties' extensive briefing. And at this point we have cross - motions for summary judgment, so, in essence, both sides are movants.

So what I'd like to do is, hear from the plaintiffs ' side first, then we'll hear from the defendants. Then I'll allow the plaintiffs an opportunity to respond, and t hen the defendants will have the final word on that side.

At this juncture, I think we can go ahead and just jump right in. So, why don't we start from whoever wants to begin from the plaintiffs.

MR. FISHMAN: Thank you, Judge.

THE COURT: Okay.

[29] find New Jersey's efforts to circumvent that law are not constitutional under the supremacy laws. Thank you, Judge.

THE COURT: Thank you. Mr. Mishkin.

MR. MISHKIN: Thank you, your Honor. Jeffrey Mishkin for the plaintiffs.

I join in the arguments of Mr. Fishman and I will not repeat them, but there are a few points of emphasis I would like to make. And I think in particular trying to unpack this affirmative

action prohibition dichotomy that we are arguing about in commandeering, so let me start there.

Commandeering, the essence, your Honor, the defining feature of a commandeering claim is that Congress has compelled a state legislature or state officials to take some action at the direction of Congress. There can be no commandeering claim under existing Supreme Court precedent unless Congress has required or directed the state either to enact legislation or to carry out a federal regulatory program. One of those two elements must be present under current Supreme Court authority. Neither is present here.

PASPA does not require or compel the State Of New Jersey to enact any legislation or to carry out any federal program. The language - and we should start with the language – the language of PASPA is crystal clear. And all it does is prohibit the state from engaging in certain specified activities. And I won't go through all, sponsoring, [30] authorizing, you know them. The language of PASPA does not require or compel the State of New Jersey to do anything. It forbids conduct, it does not require conduct. And in that respect, your Honor, PASPA is nothing more than an

ordinary exercise of a supremacy clause itself. That's all it is.

Now, I think defendants actually concede that the language of PASPA does not require any affirmative action on the part of the State of New Jersey. Instead, their argument is that PASPA somehow implicitly requires New Jersey to enact or maintain prohibitions on sports gambling. But PASPA requires no such thing. The language does not require it. There is not a word in the legislative history suggesting that is required. And the procedural history of this very case, your Honor, shows that there is no requirement in PASPA to maintain prohibitions on sports betting.

For many years, your Honor knows, until December of 2011, the State of New Jersey's Constitution prohibited the New Jersey Legislature from authorizing gambling on Sporting events. In December of 2011, that prohibition was removed from the Constitution. PASPA did not forbid that removal and the sports organizations did not sue about that. We've never claimed that PASPA compelled the state to maintain any prohibition on sports gambling.

Now, the state says, you still must read PASPA as an implicit requirement to maintain prohibitions because, [31] according to them, as best I understand the argument, no state in the real world would permit a situation to exist where sports gambling was neither authorized nor prohibited by a state. I don't know why not. That is a perfectly plausible state of affairs, for a state to be indifferent as to whether private individuals are gambling on sports.

Let's take a moment here. The purpose of PASPA was only to stop the spread of state-sponsored sports gambling. Congress wanted to be sure that states

were not authorizing or licensing or giving their imprimatur to sports gambling. So long as states, your Honor, are not affirmatively authorizing or licensing sports betting, they are not violating PASPA. There is nothing in PASPA that requires states to enact, maintain or enforce any prohibitions on sports gambling. And for that reason, your Honor, PASPA does not violate commandeering principles.

And I believe the legal principle that decides this case is that a federal statute must be construed wherever possible to avoid constitutional defects. So if PASPA can be read in a manner that avoids a commandeering problem, that is how you must read it. And PASPA clearly can be read to avoid commandeering since it so clearly prohibits conduct and does not require conduct. And in that respect, a new point I want to go to, the *Markell* decision is very instructive.

Now, like the standing issue in *Markell*, the [32] Third Circuit did not directly address the issue of commandeering. But it did address very directly the issue of state sovereignty. The *Markell* court held that because PASPA clearly and expressly prohibits the adoption of state legislation in an area in which Congress has the power to regulate, PASPA does not infringe upon the sovereignty of the State of New Jersey. That holding is obviously and necessarily inconsistent with defendants' commandeering argument.

Commandeering, we all know, means a violation of state sovereignty. And the Third Circuit held that PASPA does not violate the sovereignty of the State of New Jersey. And I don't think the Court here can -- you can't s imply assume that the Third Circuit i s unaware of or unfamiliar with or forgot about principles of commandeering.

The *Markell* case started out

THE COURT: That issue was never put before the Court, correct?

MR. MISHKIN: The issue of state sovereignty was, your Honor, not commandeering.

THE COURT: The commandeering issue?

MR. MISHKIN: Right. That's right. But, remember, the ultimate conclusion was, the sovereignty of the State of New Jersey is not being violated. And I want to talk about the procedural posture of *Markell*.

[33] That started out as an appeal from a denial of a preliminary injunction. But the Third Circuit converted it to a summary judgment motion. On a summary judgment motion, that searches the record, and any available argument, whether it's made or not, is open to the Court to decide to grant or deny summary judgment. That's how you view -- you look at the whole record and all the possible arguments on summary judgment. And, again, unless you're going to assume that, even though the parties didn't raise it, the Court was somehow unfamiliar with it and should not have said, but it did say, the sovereignty of the State of New Jersey is not violated by PASPA. That's a holding by the Third Circuit.

And the request here is a different holding, the exact opposite holding. And I don't think you can make that holding based on, Well, there probably were more arguments that could have been made on that, but they weren't made. The holding was, the sovereignty of New Jersey has not been violated.

And I think it's also important that with the issue of state sovereignty very much on its mind, the Third

Circuit held, and now I am quoting, "PASPA unmistakably prohibits state- sponsored gambling and, therefore, does not violate the sovereignty of the State of New Jersey." That is the reason there was no need, your Honor, to consider –

THE COURT: The State of New Jersey?

[34] MR. MISHKIN: The State of Delaware, I'm sorry. My notes say New Jersey, I meant

Delaware.

There was no need in *Markell*, given that finding, that the way you read PASPA is an unmistakable prohibition.

That can't be commandeering, because commandeering only comes up, not if you are prohibiting, but if you are compelling. So that, I think, is what I want to say on commandeering.

On the discrimination point. Again, Mr. Fishman has covered this quite well, that even where there are distinctions being made among states, there is still a rational-basis test. And so long as there is, you know, a reason for the grandfathering, such as an economic reliance interest, that would satisfy rational-basis scrutiny.

But there really is another rational basis here, that is, somewhat separate from the grandfathering. The purpose of PASPA was to stop the spread, the spread of state-sponsored gambling. The idea was to ensure that the existing problem of state-sponsored gambling did not get any worse than it already was. And Congress' determination to stop the spread of state-sponsored gambling applied equally to all states, as the State of Delaware found out in *Markell* because Delaware is one of the grandfathered states.

But when Delaware tried to expand, to spread gambling beyond the gambling operations that it already had in existence, the Third Circuit found a clear violation of PASPA.

[35] So for Congress to say, Look, we take the world as we find it, we see a problem, we don't want it to get any worse, so we hereby forbid the spread of state-sponsored gambling. That is perfectly rational, your Honor, and that applied to all of the states. Actually, it didn't quite apply to New Jersey, because New Jersey was favored above all other states. New Jersey, for the reliance interests that Mr. Fishman talked about, I think Congress was indeed moved by the investments New Jersey had made in casinos and it was going to give New Jersey, no other state but New Jersey, a one-year opportunity to adopt sport s gambling for its casinos if it wanted to do that. New Jersey chose, wasn't commandeered in any way, it chose not to adopt sports gambling in its casinos. So of all the states in the Union, New Jersey I think has the least basis of anyone to complain that it was treated unfairly by Congress when it enacted PASPA.

Your Honor, the last point I will make is --

THE COURT: Is there any argument that while, even if we accept as true, and I 'm not saying that I do, that PASPA passes a facial challenge, is there an "as applied issue " here when it comes down to the way it's been applied to the states? Is there, I guess, in essence, almost like an equitable argument here that it has a *de facto* result of really creating an inequity within the states?

[36] MR. MISHKIN: Your Honor, where Congress is legislating pursuant to the commerce power, very

broad power, if it has a rational basis for the distinctions it is making, then the distinctions are not unconstitutional. It has to do with whether Congress has acted rationally or not.

And, again, the Supreme Court in the *Dukes* case -- I know that we're in two states there. The *Delaware River Basin* case at least involves some municipalities, City of Philadelphia and other counties that were, perhaps, not being treated exactly equally; but the Third Circuit, in sending that case back to the District Court, did not suggest there was anything other than rational-basis scrutiny even if the grandfathering was permanent. And I think it's instructive, it's not cited to you by the defendants, but if you go back to the remand, the decision on remand where the Court did a much more complete analysis of the facts and concluded that there was a rational basis, there was an economic reliance interest in the grandfathering that was permitted in that case, and then went on to talk about, Well, it is a permanent grandfathering, does that change anything? Does that change the test? And the Court concluded, No. I read the Supreme Court decision in *Dukes*. I read the Third Circuit decision in this case, the *Delaware River Basin* case, and although it might raise a little more of an issue in the mind of a Court, at the end, it is rational-basis scrutiny. And as long as [37] Congress has a rational basis, it can make distinctions among the states. Thank you.

* * *

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NOS. 13-1713/1714/1715

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,an unincorporated association; NATIONAL BASKETBALL ASSOCIATION; a joint venture; et al.

UNITED STATES OF AMERICA
(Intervenor in District Court)

v.

GOVERNOR OF THE SATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; et al.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; STEPHEN M. SWEENEY; SHEILA Y. OLIVER
(Inervenors in District Court)

Stephen M. Sweeny and Sheila Y. Oliver,
Appellants in 13-1713

Transcript from the audio recording of the oral argument held Wednesday, June 26, 2013 at the United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania. This transcript was produced by James DeCrescenzo, a Fellow of the Academy of Professional Reporters, a Registered Diplomate Reporter, an Approved Reporter of the United States District Court.

BEFORE:

THE HONORABLE JULIO M. FUENTES
THE HONORABLE D. MICHAEL FISHER
THE HONORABLE THOMAS I. VANASKIE

[2]

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; et al.

UNITED STATES OF AMERICA
(Intervenor in District Court)

V.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK., Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; et al.

NEW JERSEY THOROUGHBRED HORSEMEN' S ASSOCIATION, INC.; STEPHEN M. SWEENEY; SHEILA Y. OLIVER (Intervenors in District Court)

New Jersey Thoroughbred Horsemen' s Association, Inc.,
Appellant in 13-1714

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint

venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al.

UNITED STATES OF AMERICA
(Intervenor in District Court)

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; et al.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; STEPHEN M. SWEENEY; SHEILA Y. OLIVER
(Intervenors in District Court)

Governor of the State of New Jersey,
David L. Rebuck and Frank Zanzuccki

Appellants in 13-1715 [3]

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[52] section four of the Voting Rights Act, that distinguished among states.

If you look at this statue the provision that distinguishes among states is 3704. It left in place, the Supreme Court that is, section five of the Voting Rights Act, section two of the Voting Rights Act, all of the other things that by their terms apply neutrally to all states. That's 3702.

THE COURT: Mr. Clement, thank you very much.

MR. CLEMENT: Thank you.

THE COURT: Mr. Fishman.

MR. FISHMAN: May it please the Court, Paul Fishman on behalf of the United States. Let me first address the question about what we did or did not say about preemption in the district court, because I do think that the State of New Jersey has slightly mischaracterized what I said at oral argument. And they've given a cite in their brief but it's, it's pages 2706 to 2708 of the transcript.

And I was asked a question by Judge Shipp whether there was any kind of regulatory [53] scheme in place, and I'm quoting, "as a result of either the criminal laws and PASPA combined or the like. I need just to make sure I'm clear on that whole issue if you're asserting that."

And I then talked for a full page about the fact that there's no regulatory scheme in place in New Jersey because of PASPA. Apparently I misunderstood his question because he was asking about a federal regulatory scheme.

He then said, "But to the extent that we're talking about any kind of supremacy clause analysis for preemption purposes, are you contending that there was any kind of regulatory scheme in place?" And I said, "No," there's no regulatory scheme in place. And I said, "If I might clarify, I don't think anybody's arguing the actual doctrine of preemption." We are simply arguing that there was supremacy clause issue.

And let me clarify, and it's a lot like what Mr. Clement just said. But as I read the preemption cases, preemption is a struggle often by the courts to figure out whether Congress has occupied the field or not, or whether what a state wants to do is inconsistent with what [54] Congress wants to do.

So if you read the preemption cases, whether they're field preemption cases or obstacle preemption cases, or the three other king, three or four other kinds of preemption cases there are, inevitably what they all come down to is that question, courts trying to figure out what Congress meant, how much room did Congress leave to the states.

In this case, as Mr. Clement said, there is no question, no question whatsoever what Congress wanted to do, what Congress didn't want the states to do.

Congress, confronted with a problem in 1992, with the spread of authorized, sponsored and the other six words in the statute, sports gambling, Congress said this is a national problem and it's bad, it's bad for sports, it's bad for the country, it's bad for kids who watch games, it's bad for the athletes, it's bad for the integrity of the sport.

So what did Congress do? Congress was not writing on a clean slate, and this responds a little bit to your question, Judge Fisher, about [55] kind of what

relationship is between federal policy and state gambling. And you were a state Attorney General, you said that before. You know that in the field of gambling there is effectively a synergistic relationship, a symbiotic relationship between the federal and state governments.

Federal government regulates gambling to a certain extent, as Mr. Clement point out. But largely for the last I don't know how many, hundred, hundred years at least, the regulation of gambling mostly has been left by Congress to the states. In fact, some of the federal statutes actually refer to state law to try to figure out what might or might not be a violation of federal law.

So when Congress comes to the table in 1992, it says look, the sates are regulating a lot of gambling out there, they're letting something happen, they're not letting other things happen, but there's one thing that we really don't like, and whether you characterize it as a ceiling or a floor, Congress decided in 1992 the one thing it would not let happen out there is the kind of [56] authorized sponsored gambling that it saw as an emerging national phenomenon.

So they did that. And that's a completely rational decision by Congress, it made complete sense at the time and it still makes complete sense today.

THE COURT: But is that preemption?

MR. FISHMAN: Is it preemption? Technically I don't know the answer to that question.

THE COURT: You're not urging - -

Mr. FISHMAN: What I want to say it --it's the supremacy clause. If Congress says you can't do something, it's not preemption to try to figure out whether there's room left for the state. They said no.

THE COURT: Are you urging that we address preemption?

MR. FISHMAN: No, I'm not urging --

THE COURT: You're not, are you?

MR. FISHMAN: No, I'm - -

THE COURT: We can --

MR. FISHMAN: No, I'm suggesting --

THE COURT: We can sidestep [57] preemption, can't we?

MR. FISHMAN: It's not relevant as a legal doctrine for trying to figure out in this case whether there was room for New Jersey to do what New Jersey is trying to do.

What New Jersey is trying to do is flatly inconsistent with federal law. There's nobody who disputes that. There's nobody who says that what New Jersey is doing is allowed by PASPA. PASPA says no.

So that's the - - but then, having reached the conclusion that it wanted to stop something that it saw as pernicious, Congress then says all right, look, we have this practical problem and it's the kind of a problem that legislatures, Congress deal with all the time, we have practical problem.

We have an evil we would like to eradicate, but there are places in the county where people are economically relying on a particular form of activity, in

this case it's lotteries in three states and an organized sports book in Nevada.

And so it's not really an intention to [58] discriminate in favor or against certain states, though I don't doubt that the court may be right that there was certain give and take in the legislature between various Senators or Congressmen about what would or would not play across the country.

But the fact is Congress, recognizing these economic interests already existing, does what Congress is perfectly entitled to do. Congress says there' a reliance interest out there. So while the solution we're crafting is not remotely perfect, and Duke says that that's fine, Nordlinger says it, there are lots of cases that say it doesn't have to be a perfect fit.

Congress, faced with a practical problem says you know what, operating under the power of the commerce clause with a rational basis, we have a rational reason to do this. And that satisfies the rational basis test. Congress certainly had the power to do that under the commerce clause.

And so no, judge, I don't think it matters whether you call it preemption or not, Congress said no.

[59] THE COURT: Could Congress do this in a different setting? It's concerned about the proliferation of medical marijuana laws and so it passes a law that says no state shall -- it shall be unlawful for a governmental entity to authorize medical marijuana, something like that, except for those states that already have it?

MR. FISHMAN: Well, we're not writing on an entirely clean slate.

THE COURT: Right, I understand that.

MR. FISHMAN: There is already a federal statute - -

THE COURT: I understand that.

MR. FISHMAN: -- that no one can get marijuana at all.

THE COURT: Right. And I understand that too.

MR. FISHMAN: And I'm a little reluctant to wade into that debate simply because there's so much controversy about it at the moment.

THE COURT: Right.

MR. FISHMAN: I don't actually know the answer to that question. I haven't thought it through entirely. But the context in which [60] Congress would be writing in that arena would be different because it's not gambling where there is this, where there's exactly the same reliance by the feds on state enforcement.

Now I want to talk for a second about the equal sovereignty argument because I agree with Mr. Clement that in terms of equal sovereignty that Shelby County did not change the landscape for these purposes at all. For the commerce clause, itis still a rational-basis analysis.

The Voting Rights Act, there construction amendments are in a very much more charged context. And they came to the court with a lot of background. And you combine that with what's at issue in the voting rights cases, which is a core federal, a core state interest, right? Because what is more basic to the concept of what state governments are about than voting? And incomes with the entire history.

And so to try to take that analysis and a vague, relatively new statement of what the law might be,

that it has to be sufficiently related, and try to take it outside that context I don't think makes a lot of sense.

[61] In fact the court itself said in Shelby County, this was extraordinary legislation that imposed on states an obligation very different from the kinds of obligations that states have in any other context, and they're talking about there-clearance --

THE COURT: On the other hand Justice

Ginsburg in her dissent, the first statute she mentioned as perhaps being implicated by this doctrine is PASPA.

MR. FISHMAN: She did say that. There's a list of, there are a list of four or five statutes in Justice Ginsburg's dissent

THE COURT: Right.

MR. FISHMAN: -- in which -- but she asked the rhetorical question, what's the impact going to be of that. I don't think she answers the question, and it's not inconsistent with other dissents in which people sort of raise their hand and say oh my God, where are we going next?

But I think the answer to that question is clear as we expressed in our 28(j)letter to the court yesterday. I don't think that Shelby County alters the analysis for the purposes [62] of this case.

I do want to talk for a minute and particularly in response to Judge Fuentes' question about New York and Printz because I do think that the anticommandeering doctrine has no applicability to this case.

And I want to start by saying first of all in 20 years there have been two cases in which the Supreme

Court has said the anticommandeering provisions of the Tenth Amendment have been violated.

If you take Mr. Olson's brief at its word and you count Coyle and Smith, then it's two cases in a hundred years. But I don't actually think that Coyle and Smith is an anticommandeering case. I think it's a very different case for the reasons we articulated in our brief. It has to do with Article IV and it has to do --

THE COURT: And you don't think Sebelius is an anticommandeering case?

MR. FISHMAN: I don't think Sebelius-- at the end of the day I don't think, I don't think -- there's language about the Tenth Amendment but I don't think that's where they came out in the [63] end.

THE COURT: Right. Okay.

MR. FISHMAN: But I think that teething that clearly motivated the court in New York, and again as a former Attorney General you'll appreciate this, what the State of New York was faced with, what all states were faced with in New York was the Low Level Radioactive Waste act which had sort of three tiers of incentives for states to comply with what were going to be the federal standards for where you were going to store low-level radioactive waste, which was a huge problem.

What's interesting about New York is that the first two tiers, which were actually quite Draconian and really were economically severe forth states who were not complying, were perfectly fine under New York. They could tax states more, and you could collect taxes and redistribute them if you weren't complying with federal standards, that was fine.

If you were from a state where testate had not yet adopted the federal regulations and you were a dumper and you went to another state [64] you could be charged double or triple or turned away entirely. That was totally fine.

What the court didn't like in New York was the idea that if you didn't comply with federal standards and you were a state government you would end up owning, owning low-level radioactive wasteland all the attendant tail liability that went with it. That's pretty extraordinary. And you can see why the court was offended by that.

In Printz the court then turns to the idea that the federal government has this enforcement scheme in which it wants to stop certain people from buying weapons, prohibited people under the law.

And what it says is we're not going to have the federal government be the only people to-do this background check. In fact the background checks are going to be done by state officials. And those state officials must use reasonable efforts to figure out whether people are prohibited under the statute or not.

And the opinion in that case written by Justice Scalia says no, no, you can't make state officials affirmatively do things. And he [65] reiterates in the Printz case that the real issue, and he says, I'm quoting, the real issue is, quote, "the forced participation of the States' executive in the actual administration of a federal program."

What he didn't like was the discretion -- there's no discretion on the part of the state officials to decide what they would or would not do.And that decision was consistent with the Hodel case and the FERC case in which the court said, look, if the state government

doesn't have to enforce standards, doesn't have to spend money, doesn't have to participate in the federal regulatory scheme, then there's not a problem. And that's exactly what happened in Reno.

I know that the state and the other defendants would like to cabin Reno. But you're exactly right. The language in Reno, I won't quote it now, the language in Reno is enormously more expansive than that and really says if you're not making the state do something affirmative, if you're really not making the state go out and regulate its citizens, if you're not making the [66] state spend money, if you're not making the state do a whole host of things then you haven't violated the anticommandeering provisions of the Tenth Amendment.

And I don't think it's fair, as one of my adversaries did, to characterize it as mere merchandising. I think that it was very much the concern with how the state uses its own data, information that comes to it as a state government.

The last argument I want to deal with is the argument that somehow we've changed our position on PASPA, that somehow we have now decided that PASPA does not let the state make changes to its existing gambling regulations that are different from the ones that are at issue in this case.

And I wrote down what I thought was a pretty good list as Mr. Olson went through them.

He said they can't change the law, they have to enforce the law on the books, they have to keep it illegal.

None of that is true. I suspect, though I don't know the answer to this question, that the state gambling laws in all 50 states are [67] different to some

extent. The penalties are different. How many people have to participate in a gambling operation are different. The court knows from having served as an Attorney General that gambling cases are not always enforced. Law enforcement officials make discretionary decisions all the time based on budget or priorities that some gambling cases are going to get done and some don't.

We're not asking the State of New Jersey to to do any of that. It is up to the State of New do or not Jersey to determine for itself the extent to which it will or will not enforce that law. Nothing in PASPA --

THE COURT: So New Jersey could repeal a ban on wagering on sporting events?

MR. FISHMAN: As a matter of law it could. It would be incredibly irresponsible.

THE COURT: It would not violate PASPA?

MR. FISHMAN: No. But the reason it hasn't done that for 20 years or a hundred years is not because of PASPA. It hasn't done it because it's a really, really, really bad idea. It's [68] irresponsible, it would be bad policy to just allow gambling to go unfettered.

New Jersey is not trying to do this now because it wants to stop the flood of illegal gambling. The legislative history in New Jersey is quite clear, they're doing this because -- the reason is citizens of New Jersey - -

THE COURT: What if New Jersey said, instead of doing what they did, they said the only place where you can get an NCAA basketball pool is at the casino in Atlantic City and anyone who gets one from their friend at work could be prosecuted?

MR. FISHMAN: Okay.

THE COURT: Would that violate PASPA?

MR. FISHMAN: Would it violate PASPA? You know, to the extent that the state is now sponsoring or advertising or promoting betting on amateur or professional sporting events, I guess the answer would be yes.

But it wouldn't apply in Mr. Riccio's in terrorem example to the people who were playing ping-pong in their basement and people who are betting perhaps on the Jets and the Giants or the Eagles and the Steelers. It wouldn't cover that.

[69] And so I think we have to be very careful about saying that New Jersey all has been placed into this Hobson's choice of doing one thing or the other. It doesn't.

There's one thing it can't do. It can't do what it's trying to do here. But if it wants to tinker with its gambling statute in a responsible exercise of state law and enforcement power, it's perfectly free to do that.

THE COURT: Mr. Fishman, thank you very much.

MR. FISHMAN: Thank you, judge.

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Nos. 13-967, 13-979 and 13-980
In the Supreme Court of the United States

Chris Christie, Governor of New Jersey, et al.,
Petitioners
v.
National Collegiate Athletic Association, et al.

New Jersey Thoroughbred Horsemen's
Association, Inc., Petitioner
v.
National Collegiate Athletic Association, et al.

Stephen M. Sweeney, President of the
New Jersey Senate, et al., Petitioners
v.
National collegiate athletic association, et al.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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QUESTIONS PRESENTED

The Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. 3701 *et seq.*, prohibits States and other governmental entities from, among other things, "licens[ing], or authoriz[ing] by law or compact," gambling on sporting events. 28 U.S.C. 3702(1). PASPA also prohibits persons from sponsoring, operating, advertising, or promoting sports gambling schemes pursuant to state law. 28 U.S.C. 3702(2). PASPA exempts state-sponsored sports gambling schemes in four States that were already in operation at the time of PASPA's enactment. 28 U.S.C. 3704(a)(1)-(2). The questions presented are:

1. Whether PASPA's prohibition on state licensing and authorization of sports gambling violates the Tenth Amendment.

2. Whether PASPA's exemption of pre-existing state-sponsored sports gambling schemes in four States deprives the other 46 States of equal sovereignty.

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In the Supreme Court of the United States

No. 13-967
Chris Christie, Governor of New Jersey, et al.,
Petitioners
v.
National Collegiate Athletic Association, et al.

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New Jersey Thoroughbred Horsemen's
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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-82a)[1] is reported at 730 F.3d 208. The opinion of the district court (Pet. App. 83a-136a) is reported at 926 F. Supp. 2d 551.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2013. Petitions for rehearing were denied on November 15, 2013 (Pet. App. 156a-157a). The petitions for writs of certiorari in No. 13-967 and No. 13-979 were filed on February 12, 2014. The petition for a writ of certiorari in No. 13-980 was filed on February 13, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. 3701 *et seq.*, was enacted in 1992 "to stop the spread of State-sponsored sports gambling and to maintain the integrity" of professional and amateur sports. S. Rep. No. 248, 102d Cong., 1st Sess. 4 (1991) (Senate Report). PASPA's restrictions on state-sponsored sports gambling schemes apply both to the States themselves and to private parties. State and local governments may not "sponsor, operate, advertise, promote, license, or authorize by law or compact," sports gambling schemes. 28 U.S.C. 3702(1). Private parties are prohibited from sponsoring, operating, advertising, or promoting such schemes pursuant to state or local law or compact. 28

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[1] For ease of reference, all Pet. App. citations in this brief will be to the appendix to the petition for a writ of certiorari in No. 13-967.

U.S.C. 3702(2). These restrictions apply to any "lottery, sweepstakes, or other betting, gambling, or wagering scheme" that is "based * * * on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." 28 U.S.C. 3702.

The Attorney General can seek to enjoin violations of PASPA in federal court. See 28 U.S.C. 3703. PASPA also authorizes professional and amateur sports organizations to seek injunctions against violations of PASPA that involve betting on one of their competitive games. See *ibid.*

At the time that PASPA was enacted, state-sponsored sports gambling schemes were already in operation in four States (Delaware, Montana, Nevada, and Oregon). Congress adopted grandfathering provisions that exclude those pre-existing schemes from the general prohibitions of PASPA. *See* 28 U.S.C. 3704(a)(1)-(2); Senate Report 8; 138 Cong. Rec. S7276 (daily ed. June 2, 1992) (statement of Sen. DeConcini). As explained by the Senate Judiciary Committee, "[a]lthough the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively * * * or to prohibit lawful sports gambling schemes * * * that were in operation when the legislation was introduced." Senate Report 8. PASPA grandfathers only the particular sports gambling schemes that were in existence when it was enacted, and does not permit the introduction of other sports gambling schemes in those States. *See Office of the Comm'r of Baseball* v. *Markell*, 579 F.3d 293, 301-304 (3d Cir. 2009) (finding that 28 U.S.C. 3704(a)(1) does not permit the Delaware lottery to offer betting on National Basketball

Association games because the lottery did not offer such betting when PASPA was enacted), cert. denied, 559 U.S. 1106 (2010).

In addition, PASPA offered an exception for any casino-based sports gambling scheme that was authorized by a State within one year of PASPA's effective date. 28 U.S.C. 3704(a)(3). That exception was subject to conditions that effectively confined it to New Jersey.[2] However, New Jersey chose not to establish state-sponsored sports gambling within the time permitted under that exception. See *In re Petition of Casino Licensees for Approval of a New Game, Rulemaking and Authorization of a Test*, 633 A.2d 1050, 1051 (N.J. Super. Ct. App. Div.), aff'd, 647 A.2d 454 (N.J. 1993) (per curiam). As a result, New Jersey is subject to PASPA's general restrictions on state-sponsored sports gambling.

2. In 2011, New Jersey amended its constitution to permit the legislature to "authorize" wagering "on the results of any professional, college, or amateur sport or athletic event" at casinos and racetracks throughout the State. See N.J. Const. Art. 4, § 7, Para. 2(D)-(E). That new constitutional provision retains prohibitions on gambling "on a college sport or athletic event that takes place in New Jersey or on a

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[2] The exception was available only if casino gambling had been in operation in a State for the preceding ten years and had been confined to a single municipality in the State. 28 U.S.C. 3704(a)(3)(A)-(B). New Jersey was the only State that could satisfy those conditions. See 138 Cong. Rec. at S7280 (statement of Sen. Grassley) (recognizing New Jersey to be the only eligible State).

sport or athletic event in which any New Jersey college team participates regardless of where the event takes place." *Id.* § 7, Para. 2(D).

The New Jersey Legislature then enacted the Sports Wagering Law, which authorizes "wagering at casinos and racetracks on the results of certain professional or collegiate sports or athletic events." 2011 N.J. Laws 1723. To implement that statute, New Jersey promulgated regulations setting forth the procedures by which Atlantic City casinos and racetracks throughout New Jersey could obtain licenses and conduct sports gambling. See N.J. Admin. Code § 13:69N (2014). As a result of those constitutional, statutory, and regulatory provisions, sports gambling in New Jersey may be authorized and conducted only pursuant to a state-issued license. See N.J. Stat. Ann. § 5:12A-2 (West 2012).

3. a. In August 2012, before New Jersey issued any license for sports gambling, respondent sports organizations brought suit against the Governor and other state officials under PASPA. The sports organizations contended that, as a matter of law, New Jersey's efforts to authorize and license sports gambling schemes violate PASPA. Pet. App. 139a-140a.

In response, petitioners raised numerous constitutional challenges to PASPA. First, they asserted that PASPA's regulation of sports gambling exceeds Congress's power under the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3. Second, they claimed that 28 U.S.C. 3702(1), which prohibits States from licensing or authorizing sports gambling by law or compact, violates the Tenth Amendment anti-commandeering principle recognized by this Court in *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v.

United States, 521 U.S. 898 (1997). Third, they argued that 28 U.S.C. 3704(a)(1)-(2), which grandfathered pre-existing state-authorized sports gambling schemes in four states, deprives the 46 other states of equal sovereignty. Finally, they argued that the grandfather provisions violate the Due Process Clause of the Fifth Amendment. Following the assertion of those defenses, the United States intervened to defend the constitutionality of PASPA pursuant to 28 U.S.C. 2403. See Pet. App. 87a; see also *id.* at 93a-133a.

The district court rejected all of petitioners' constitutional claims. See Pet. App. 83a-136a The court found that PASPA is a constitutionally permissible exercise of Congress's Commerce Clause authority. *Id.* at 93a-101a. The court further concluded that PASPA does not offend anti-commandeering principles because it does not obligate state governments to adopt, enforce, or administer federal law, but instead merely prohibits them from sponsoring sports gambling. *Id.* at 101a-125a. The court also held that PASPA's grandfather provisions do not offend principles of equal sovereignty or the equal protection component of the Due Process Clause. *Id.* at 125a-133a. The court accordingly entered judgment in favor of the sports organizations, enjoining the New Jersey defendants from implementing the state-sponsored sports wagering initiative. *Id.* at 136a.

b. The court of appeals affirmed. Pet. App. la-59a.

After determining that the sporting organizations had Article III standing (Pet. App. lla-24a), the court of appeals addressed petitioners' constitutional defenses. The court began by rejecting the claim that PASPA's restrictions on state-sponsored sports gambling exceed Congress's commerce power. The court

reasoned that organized sporting contests such as those conducted by the sporting organizations are economic activities with substantial effects on inter-state commerce, as is wagering on those contests, and that prohibiting states from licensing sports wagering is a rational means of regulating commerce in this area. *Id.* at 25a-30a.[3]

The court of appeals also rejected petitioners' claim that PASPA violates the Tenth Amendment's commandeering prohibition. Pet. App. 30a-53a. The majority first noted that because PASPA is a valid exercise of Congress's Commerce Clause power, it renders conflicting state laws invalid under the Supremacy Clause. The court also explained that the preemption of state laws via the Supremacy Clause does not constitute impermissible commandeering. *Id.* at 37a (A "[S]tate's sovereignty is [not] violated when it is precluded from following a policy different than that set forth by federal law.").

The court of appeals then compared the prohibition on state licensing and authorization of sports gambling in 28 U.S.C. 3702(1) with the federal statutory provisions invalidated on anti-commandeering grounds in *New York* and *Printz*. Pet. App. 39a-46a. The court noted that the laws in *New York* and *Printz* obligated state governments to take affirmative actions in support of the federal regulatory schemes. By contrast, PASPA "does not *require* or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law." *Id.* at 39a.

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[3] Petitioners do not seek review of this portion of the court of appeals' judgment.

The court of appeals found it "hard to see how Congress can 'commandeer' a state, or how it can be found to regulate how a state regulates, if it does not require it to do anything at all." Pet. App. 39a-40a. The court noted that, under this Court's Tenth Amendment precedents, "statutes prohibiting the states from taking certain actions have never been struck down," even when the statutes (unlike PASPA) "require the expenditure of some time and effort or the modification or invalidation of contrary state laws." *Id.* at 40a (citing *Reno* v. *Condon*, 528 U.S. 141, 150 (2000), and *South Carolina* v. *Baker*, 485 U.S. 505, 515 (1988)).

The court of appeals rejected petitioners' contention that Section 3702(1) affirmatively obligates States to enact and maintain laws banning sports gambling. The court explained that the mere absence of state prohibitions on sports gambling does not constitute "authoriz[ing]" gambling "by law or compact," 28 U.S.C. 3702(1), and hence PASPA leaves States free to repeal their laws prohibiting sports gambling if they wish. Pet. App. 40a-43a.

The court of appeals acknowledged the concern that affirmative federal obligations on States could be disguised as conditional prohibitions—for example, by recasting the background-check requirement in *Printz* as a rule prohibiting States from issuing hand-gun permits unless state officials perform background checks. Pet. App. 43a. But the court pointed out that the specter of an affirmative mandate masquerading as a conditional prohibition was irrelevant in this case, because PASPA's prohibition on state authorization and licensing of sports gambling is an unconditional one, which "simply bars certain acts under any and all circumstances." *Ibid.*

The court of appeals also noted that, independent of Section 3702(1)'s restrictions on state licensing and authorization, Section 3702(2) prohibits individuals from engaging in sports gambling schemes pursuant to state law. Pet. App. 49a. Thus, "even if the provision that offends New Jersey, [Section] 3702(1), were excised from PASPA, [Section] 3702(2) would still plainly render the Sports Wagering Law inoperative by prohibiting private parties from engaging in gambling schemes pursuant to that authority." *Ibid.* The court reasoned that Section 3702(2) thus has an independent preemptive effect on the New Jersey gambling law. *Ibid.*

Finally, the court of appeals rejected petitioners' equal sovereignty challenge. Pet. App. 53a-56a. The court declined to invalidate PASPA simply because the grandfather clauses permit state-sponsored sports wagering in four States. The court questioned the applicability of the equal sovereignty concept to Commerce Clause legislation, but held that even if that doctrine were applicable, PASPA's prohibitions were *"precisely tailored"* to Congress's goal of preventing the expansion of state-sponsored sports wagering. *Id.* at 54a-56a.

Judge Vanaskie dissented. He disagreed with the panel majority's anti-commandeering analysis, but agreed with the majority in all other respects. Pet. App. 60a-82a.

ARGUMENT

The court of appeals held that Section 3702(1) of PAPSA, which bars States from licensing and authorizing sports gambling schemes, violates neither the anti-commandeering principle of the Tenth Amend-

ment nor principles of equal sovereignty. That decision is correct and does not conflict with any decision of this Court or any other court of appeals. And because PASPA independently prohibits private parties from conducting state-authorized sports gambling schemes, New Jersey's casinos and racetracks may not lawfully engage in sports betting regardless of how the constitutionality of Section 3702(1) is resolved. Further review is not warranted.

1. a. Under the Tenth Amendment, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz* v. *United States*, 521 U.S. 898, 925 (1997). On only two occasions, in *New York* v. *United States*, 505 U.S. 144 (1992), and in *Printz*, has this Court held federal statutory provisions to offend this rule against commandeering the machinery of state governments. See *Reno* v. *Condon*, 528 U.S. 141, 149-151 (2000) (rejecting such a challenge).

As the court of appeals recognized (Pet. App. 39a-46a), the statutory provision at issue in this case differs fundamentally from the provisions invalidated on anti-commandeering grounds in *New York* and *Printz*. In *New York*, the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (Nuclear Waste Policy Act), 42 U.S.C. 20216 *et seq.*, obligated States either to take ownership and possession of nuclear waste and assume liability for the operators' damages, or to regulate the waste in accordance with Congress's instructions. 505 U.S. at 153-154, 175-76. In *Printz*, the Brady Handgun Violence Prevention Act (Brady Act), Pub. L. No. 103-159, 107 Stat. 1536, obligated state law-enforcement officers to conduct background checks in connection with the transfer of handguns. 521 U.S. at 903. Thus, the

statutes at issue in those cases turned the States into involuntary agents of the federal government, forcing them to enact federally prescribed legislation or execute federal law, and expend state funds in the implementation of federal regulatory programs.

In contrast, PASPA does not obligate States to enact any law or to implement or administer any federal regulatory requirement. Indeed, PASPA does not require States to do anything. New Jersey was able to comply with PASPA for more than 20 years without taking any legislative or administrative action and without expending any resources. PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part. Pet. App. 41a-43a. The court of appeals was therefore correct to hold that PASPA does not commandeer the governmental machinery of New Jersey, or any other State, in any way.

Petitioners concede that *New York* and *Printz* "involved affirmative commands to the States," but they assert that those decisions establish a far broader rule, under which Congress may not enact legislation that restricts a State's ability to license or otherwise affirmatively authorize private conduct. 13-967 Pet. 15, 20. That reading of *New York* and *Printz* is belied by the Court's express formulation of its anti-commandeering holdings in *Printz:*

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government

> may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

521 U.S. at 935; *see also id.* at 918 (examining whether the Brady Act required "the forced participation of the States' executive in the actual administration of a federal program"). Thus, this Court itself has framed the anti-commandeering principle as a restraint on Congress's power to require States affirmatively to "enact or enforce" federally prescribed regulatory requirements.

This Court's subsequent decision in *Condon*, *supra*, confirms the limits of the anti-commandeering principle and illustrates why PASPA does not run afoul of that principle. See Pet. App. 33a-34a, 46a-47a. In *Condon*, South Carolina challenged the constitutionality of the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721 *et seq.*, which prohibits States from selling personal information obtained in connection with a motor vehicle record. 528 U.S. at 143. In rejecting South Carolina's anti-commandeering claim, the Court explained that "the DPPA does not require the States in their sovereign capacity to regulate their own citizens," "does not require the South Carolina Legislature to enact any laws or regulations," and "does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id.* at 151. The Court in *Condon* "accordingly conclude[d] that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*." *Ibid.*

Likewise here, PASPA does not require the States to regulate their own citizens, does not require them to enact any laws or regulations, and does not require state officials to assist in the enforcement of federal laws.[4] It is therefore just as "consistent with the constitutional principles enunciated in *New York* and *Printz*" as the law upheld in *Condon*. See 528 U.S. at 151

Petitioners suggest that the Third Circuit's reasoning would permit Congress to recast impermissible commands to State legislatures as conditional prohibitions—for example, by prohibiting a State from licensing particular private activity except in conformity with federal conditions, thereby effectively compelling the State to conform its licensing requirements to federally imposed terms. 13-967 Pet. 27-28. But as the court of appeals pointed out, PASPA does nothing of the sort. Pet. App. 43a. It does not prohibit States from licensing sports gambling unless they do so in

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[4] Petitioners attempt to distinguish *Condon* on the ground that South Carolina there was acting as a market participant, not as a sovereign. 13-967 Pet. 21. But *Condon* addressed South Carolina's status as a market participant not in response to the State's anti-commandeering claim, but in response to a different constitutional objection—namely, the claim "that the DPPA is unconstitutional because it regulates the States exclusively." 528 U.S. at 151. To the extent that States undertake to act as market participants in sports gambling schemes, the restrictions that apply to them under PASPA are equally applicable to private parties. Compare 28 U.S.C. 3702(1) (unlawful for "governmental entity to sponsor, operate, advertise, [or] promote" sports gambling), with 28 U.S.C. 3702(2) (same prohibition for private parties). New Jersey has not contended that the Tenth Amendment immunizes States from federal laws that regulate them as market participants.

accordance with federally prescribed standards. Instead, it flatly prohibits state licensing and authorization of sports gambling. See *ibid.* (PASPA "simply bars certain acts under any and all circumstances").[5]

The court of appeals therefore was not called on to decide whether, or in what circumstances, the Tenth Amendment's anti-commandeering principle might be offended by conditional federal restrictions. Indeed, the court emphasized that it "t[ook] seriously the argument that many affirmative commands can be easily recast as prohibitions," and declared that "[t]he anti-commandeering principle may not be circumvented so easily." Pet. App. 43a. Thus, neither the court of appeals' decision nor PASPA itself provides an occasion for this Court to address the constitutionality of the kinds of conditional prohibitions hypothesized by petitioners.

b. Section 3702(1) of PASPA does subject States to a limitation on their legislative and administrative authority: it prohibits States from licensing or "authoriz[ing] by law or compact" any sports gambling scheme. But there is nothing constitutionally suspect about federal legislation that disables a State from enacting or implementing a particular regulatory program. The constitutionality of such legislation follows directly from the Supremacy Clause, which makes a federal law enacted pursuant to the Constitution "the supreme Law of the Land" and requires inconsistent

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[5] Of course, this Court has sustained Congress's power to enact a statute under which a State may choose to adopt regulations satisfying federal standards and the federal government will assume regulatory responsibility if the State chooses not to do so. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288-289 (1981).

state laws to give way. U.S. Const. Art. VI, Cl. 2. By virtue of the Supremacy Clause, the federal government, acting within the scope of its enumerated powers, is free to enact laws that preclude States from enacting and implementing otherwise permissible legislation. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States.").

Nor is there anything novel or constitutionally suspect about federal legislation that, like Section 3702(1), operates by expressly prohibiting States from enacting particular laws. See, *e.g.*, 15 U.S.C. 376a(e)(5)(A) ("No State, local, or tribal government, nor any political authority of 2 or more State, local, or tribal governments, may enact or enforce any law or regulation" placing specified restrictions on delivery of "cigarettes or smokeless tobacco" by common carriers.); 23 U.S.C. 102(a) ("No State or political subdivision of a State may enact or enforce a law" whose "principal purpose" is to restrict access of motorcycles to federally funded highways.); 23 U.S.C. 127(b) ("No State may enact or enforce any law denying reasonable access" of trucks "to and from the Interstate Highway System to terminals and facilities for food, fuel, repairs, and rest."); 49 U.S.C. 508(c) ("No State or political subdivision thereof may enact, prescribe, issue, continue in effect, or enforce any law" prohibiting, penalizing, or imposing "liability for furnishing or using" driver "safety performance records in accordance with" federal regulations.).

In *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), this Court was presented with one such federal statute, which "expressly pre-empts the States

accordance with federally prescribed standards. Instead, it flatly prohibits state licensing and authorization of sports gambling. See *ibid.* (PASPA "simply bars certain acts under any and all circumstances").[5]

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In *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), this Court was presented with one such federal statute, which "expressly pre-empts the States

from 'enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier.' " *Id.* at 383 (quoting 49 U.S.C. App. 1305(a)(1) (1988)) (brackets in original). The Court applied that provision to invalidate state laws regulating air fare advertising, without suggesting that such an exercise of preemptive authority under the Supremacy Clause might somehow run afoul of the Tenth Amendment. See *id.* at 383-391; see also *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422, 1428 (2014) (discussing *Morales*); *American Trucking Ass'ns, Inc.* v. *City of L.A.*, 133 S. Ct. 2096, 2102 (2013).

Petitioners argue that the Supremacy Clause is irrelevant to the anti-commandeering question because it is not a grant of authority to Congress. 13-967 Pet. 22; 13-980 Pet. 30. That argument misses the point. As the court of appeals held (Pet. App. 25a-30a) and petitioners no longer contest, Congress properly enacted PASPA pursuant to its commerce power. The Supremacy Clause demonstrates that the principles of federalism embodied in the Tenth Amendment are not offended by the enactment of federal legislation supported by one of Congress's enumerated powers that disables a State from pursuing regulatory goals otherwise within the State's competence. As the court of appeals pointed out, "[t]he import of [petitioners'] argument * * * is that impermissible []commandeering may occur even when all a federal law does is supersede state law via the Supremacy Clause." *Id.* at 31a. The court of appeals properly rejected that proposition.

Petitioners acknowledge that the federal government may divest state legislatures of the power to regulate in an entire field without thereby running afoul

of the anti-commandeering principle. But they suggest that Congress may do so only when it undertakes to impose its own regulatory requirements on the field. 13-967 Pet. 25; 13-979 Pet. 16, 22. Petitioners cite no authority for such a limitation on federal preemption. If Congress wishes to do so, it is free to preempt state regulation precisely in order to leave an area unregulated. But in any event, PASPA does not merely limit the regulatory reach of the States; it directly regulates private conduct as well, by prohibiting "person[s]" from sponsoring, operating, advertising, or promoting, "pursuant to the law or compact of a governmental entity," sports gambling schemes. 28 U.S.C. 3702(2).

c. Petitioners claim that Section 3702(1) poses the kind of concerns regarding political accountability that animated this Court's decisions in *New York* and *Printz*. 13-967 Pet. 18-19; 13-980 Pet. 26-27. But the federal laws at issue in *New York* and *Printz* created the risk that legislative and executive actions undertaken by a State at the direction of the federal government would be misunderstood to be the product of the State's own policy choices, while the federal government itself would escape accountability for the burdens of its regulatory programs by hiding behind the States. *See New York*, 505 U.S. at 168-169; *Printz*, 521 U.S. at 930.

Section 3702(1) does not pose those risks. There is no risk that the electorate will blame state legislators and officers for enacting or enforcing unpopular legislation, because PASPA does not require the States to take any legislative or executive action at all. If voters wonder why a State is not licensing or otherwise affirmatively authorizing sports gambling, they need look no further than PASPA's explicit prohibitions,

the clarity of which petitioners do not dispute. The risk of confusion regarding the reasons for a State's failure to act is no greater here than it is when federal law has preemptive force in a field of activity, preventing States from enacting legislation on a particular subject matter. In both instances, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *New York*, 505 U.S. at 168.[6]

d. Petitioners' anti-commandeering claim is directed solely at Section 3702(1), the provision of PASPA that disallows States from authorizing or licensing sports gambling schemes. As noted above, Section 3702(2) of PASPA independently prohibits private parties from conducting sports gambling under a State's aegis. The existence of that separate prohibition on private action in Section 3702(2) substantially diminishes the practical significance of petitioners' challenge to the constitutionality of Section 3702(1). For even if the Tenth Amendment did permit New Jersey to authorize and license sports gambling in contravention of Section 3702(1), New Jersey's casinos and racetracks could not engage in such gambling schemes without violating Section 3702(2). See Pet. App. 49a. Thus, state-sponsored sports betting will be unlawful in New Jersey regardless of how the constitutional challenge in this case is resolved. The

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[6] Indeed, the risk is even smaller here. The Court has allowed federal legislation to preempt a field even when the legislation contains no express provision to that effect. See, *e.g.*, *Arizona* v. *United States*, 132 S. Ct. 2492, 2501-2503 (2012). Here, the reason for the State's inaction is plain on the face of the federal law.

fact that PASPA will continue to prohibit private parties from conducting state-sponsored sports gambling under Section 3702(2) militates against further review of the court of appeals' decision regarding the constitutionality of Section 3702(1).

Petitioners suggest briefly that if Congress may not constitutionally prohibit States from authorizing sports gambling schemes under Section 3702(1), it follows that Congress may not prohibit private parties from engaging in state-authorized gambling under Section 3702(2). 13-967 Pet. 26-27. That suggestion is a non sequitur. While the Tenth Amendment limits the capacity of the federal government to regulate the States themselves, it does not "shield[] the States from pre-emptive federal regulation of *private* activities affecting interstate commerce." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 291 (1981). Congress is perfectly free to prohibit private parties from engaging in commercial activities that the States have chosen to authorize. See *id.* at 289-291. Nothing in *New York* or *Printz* suggests otherwise.[7]

2. Petitioners also renew their contention that PASPA violates principles of equal sovereignty by

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[7] Nor could petitioners colorably argue that Section 3702(1) is not severable from the rest of PASPA. Even in the absence of Section 3702(1), PASPA would continue to accomplish Congress's underlying goal of preventing the expansion of state-sponsored sports gambling. Cf. *New York*, 505 U.S. at 186-187 (holding take-title provision of Nuclear Waste Policy Act to be severable because "[t]he Act is still operative and it still serves Congress' objective" without the provision). And there is no evidence that Congress would have preferred to allow the wholesale expansion of state-sponsored sports betting throughout the United States in the absence of that provision.

grandfathering sports gambling schemes already in existence when PASPA was enacted. 13-967 Pet. 31-34; 13-979 Pet. 31-41. The court of appeals correctly rejected that contention. Pet. App. 53a-58a.

Petitioners ground their equal sovereignty claim primarily in this Court's recent decisions in *Northwest Austin Municipal Utility District No. One* v. *Holder*, 557 U.S. 193 (2009) (*Northwest Austin*), and *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013). But *Northwest Austin* and *Shelby County* involve "sensitive areas of state and local policymaking," and Congress was legislating in an area that "the Framers of the Constitution intended the States to keep for themselves"—"the power to regulate elections." *Shelby Cnty.*, 133 S. Ct. at 2623-2624 (citation omitted). As the court of appeals pointed out (Pet. App. 54a-55a), concerns for federal intrusion into state prerogatives have less salience where, as here, Congress is exercising the quintessentially federal power of regulating interstate commerce. While the Constitution expressly prescribes geographic uniformity in the exercise of certain legislative powers, the Commerce Clause is not among them. See *Currin* v. *Wallace*, 306 U.S. 1, 14 (1939) ("There is no requirement of uniformity in connection with the commerce power * * * such as there is with respect to the power to lay duties, imposts and excises."); see also *Hodel* v. *Indiana*, 452 U.S. 314, 332 (1981) ("A claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact."); *Secretary of Agric.* v. *Central Roig Ref. Co.*, 338 U.S. 604, 616 (1950) (Under the Commerce Clause, Congress may devise "a national policy with

due regard for the varying and fluctuating interests of different regions.").[8]

Consistent with that principle, other legislation under the Commerce Clause has effectuated different treatment among the States. For instance, a provision in the Clean Air Act, 42 U.S.C. 7401 *et seq.*, has the effect of exempting only California from its preemption provisions regarding vehicle emission standards. See 42 U.S.C. 7543(b); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *New York State Dep't of Envtl. Conservation*, 810 F. Supp. 1331, 1337-1338 (N.D.N.Y. 1993). Similarly, the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, exempts only Hawaii from its preemption provisions. See 29 U.S.C. 1144(b)(5). It is also routine for Congress to differentiate between or among States through long-standing and deep-rooted legislative practices such as the targeting of pilot programs and certain appropriations to particular States.[9]

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[8] Even in areas (unlike interstate commerce) where the Constitution does include a geographic uniformity requirement, the Court has held that "geographically defined classifications" are permitted, so long as there is not "actual geographic discrimination." *United States* v. *Ptasynski*, 462 U.S. 74, 84-85 (1983) (discussing the Uniformity Clause in Art. I, § 8, Cl. 1).

[9] Pilot programs and targeted appropriations can be done on a State-by-State basis. For example a recent program by the United States Department of Health and Human Services allowed pilot projects for at least three States related to chronic kidney disease. See 42 U.S.C. 280g-6 (Supp. V 2011). Similarly, funds have been appropriated only to certain States. See, *e.g.*, Office of Mgmt. & Budget, *List of Agencies in New Jersey*, http://earmarks.omb.gov/earmarks-public/2009-appropriations-by-state/state-title/NEW%20JERSEY.html (reporting designated appropriations to New Jersey for 2009) (last visited May 12, 2014).

Moreover, even in the uniquely sensitive sphere of state voting laws, *Northwest Austin* and *Shelby County* did not suggest that federal legislation may not distinguish among States. To the contrary, *Shelby County* reiterated that principles of equal sovereignty do not "operate[] as a *bar* on differential treatment" of States. 133 S. Ct. at 2624. Rather, with respect to Section 4 of the Voting Rights Act of 1965, the Court in *Shelby County* discerned no sufficient relationship between Section 4's coverage criteria and the relevant burdens imposed by the Act. See, *e.g.*, *id.* at 2629 (coverage formula has "no logical relation" to current conditions"); *id.* at 2628 ("the failure to establish even relevance is fatal"). Thus, it was not the fact that Section 4 differentiated among States that ran afoul of the Constitution but instead the criteria on which such differentiation was based.

Here, in contrast, the relationship between the statutory exceptions and Congress's underlying statutory goals is obvious and manifestly rational. The sports gambling schemes sanctioned by 28 U.S.C. 3704(a)(1) and (2) are those, and only those, that were already in operation when PASPA was enacted. See p. 3, *supra*. Congress thus balanced its desire to minimize the social and economic costs associated with state-sponsored sports gambling against the significant reliance interests of the few States where such gambling was already in operation.[10] Congress was

[10] It is noteworthy in this regard that PASPA does not permit any of the States in which sports gambling was already taking place to authorize or license new sports gambling schemes in the future. See p. 3, *supra*. The line drawn by PASPA's grandfathering provisions is thus not a line between favored and disfavored

under no constitutional obligation to ignore those reliance interests. The Court has recognized in a variety of constitutional contexts that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification." *Nordlinger* v. *Hahn*, 505 U.S. 1, 13-14 & n.4 (1992) (quoting *Heckler* v. *Mathews*, 465 U.S. 728, 746 (1984)). Thus, the court of appeals correctly held that, even if the principles relied on by this Court in *Northwest Austin* and *Shelby County* extend beyond the particular sphere of local voting laws to the inherently federal sphere of interstate commerce, PASPA's distinction between the maintenance of pre-existing sports gambling schemes in four States and the introduction of new ones throughout the country does not run afoul of those principles.[11]

Petitioners also suggest that the grandfathering provisions of PASPA are inconsistent with this Court's decision in *Coyle* v. *Smith*, 221 U.S. 559 (1911). 13-967 Pet. 20. In *Coyle*, the Court invalidated a federal law that conditioned Oklahoma's admission to the Union on the State's commitment not to relocate its capital for a period of time following its admission. 221 U.S. at 562-563. That legislation ran

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States, but rather a line between one class of sports gambling schemes (those already in existence) and another (future ones).

[11] We note that New Jersey itself drew a geographical distinction when it amended its own Constitution to remove the prior prohibition on sports gambling. As amended, New Jersey's constitution continues to prohibit wagering "on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place." N.J. Const. Art. 4, § 7, Para. 2(D).

afoul of the deeply rooted equal footing doctrine, under which Congress may not impair the "fundamental attributes of state sovereignty when it admits new States into the Union." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204-205 (1999). That doctrine has no application to PASPA.

Finally, petitioners are not in a good position to complain that PASPA is discriminatory in that New Jersey was uniquely *advantaged* by the statute. As noted above, New Jersey was the only State permitted by PASPA to authorize new sports gambling after PASPA's enactment. See pp. 3-4, *supra*. New Jersey's free choice not to avail itself of that opportunity within the time offered should not now provide a basis for a claim of discriminatory treatment.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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MAY 2014

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, NATIONAL BASKETBALL ASSOCIATION, a joint venture, NATIONAL FOOTBALL LEAGUE, an unincorporated association, NATIONAL HOCKEY LEAGUE, an unincorporated association, and OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball,

Plaintiffs,

v.

C.A. No. 12-cv-04947(MAS)(LHG)
Honorable Michael A. Shipp, U.S.D.J.
Honorable Lois H. Goodman, U.S.M.J.

DEFENDANT-INTERVENOR NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.'S STATEMENT OF UNDISPUTED MATERIAL FACTS PURSUANT TO LOCAL RULE 56.1

CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission,

Defendants,

and

STEPHEN M. SWEENEY, President of the New Jersey Senate, SHEILA Y. OLIVER, Speaker of the New Jersey General Assembly, and NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Defendants-Intervenors.

Pursuant to Local Rule 56.1, and in opposition to Plaintiffs' motion for summary judgment, defendant-intervenor New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA") respectfully submits this Statement of Undisputed Material Facts.

RESPONSIVE STATEMENT TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS

1. The NJTHA agrees with the statement made in Paragraph 1 of Plaintiffs' Statement of Undisputed Material Facts ("Plaintiffs' Statement").

2. The NJTHA disagrees with the statement made in Paragraph 2 of Plaintiffs' Statement inasmuch as it is an incomplete recitation of a provision of PASPA and the Court is respectfully referred to PASPA for an accurate and complete recitation of its provisions.

3. The NJTHA agrees in part with the statement made in Paragraph 3 of Plaintiffs' Statement. It would be more accurate, however, to state that PASPA purports to permit a professional sports organization or amateur sports organization (as those terms are defined in PASPA) to commence an action to enjoin a violation of section 3702 of PASPA if a competitive game of such professional sports organization or amateur sports organization (as those terms are defined in PASPA) is alleged to be the basis of such violation.

4. The NJTHA agrees in part with the statements made in Paragraph 4 of Plaintiffs' Statement.

It would be more accurate, however, to quote the entire Section 3704(a) for a complete recitation of its provisions regarding the instances in which Section 3702 of PASPA does not apply.

5. The NJTHA disagrees with the statements made in Paragraph 5 of Plaintiffs' Statement inasmuch as they are an incomplete recitation of the legislative history of PASPA and respectfully refers the Court to PASPA's legislative history for a complete recitation of the statements made in various committee meetings.

6. The NJTHA disagrees with the statements made in Paragraph 6 of Plaintiffs' Statement inasmuch as they are an incomplete recitation of the legislative history of PASPA and respectfully refers the Court to PASPA's legislative history for a complete recitation of the statements made in various committee meetings.

7. The NJTHA disagrees with the statements made in Paragraph 7 of Plaintiffs' Statement inasmuch as they are an incomplete recitation of the legislative history of PASPA and respectfully refers the Court to PASPA's legislative history for a complete recitation of the statements made in various committee meetings.

8. The NJTHA disagrees with the statements made in Paragraph 8 of Plaintiffs' Statement inasmuch as they are an incomplete recitation of the legislative history of PASPA and respectfully refers the Court to PASPA's legislative history for a complete

recitation of the statements made in various committee meetings.

9. The NJTHA disagrees with the statements made in Paragraph 9 of Plaintiffs' Statement inasmuch as they are an incomplete recitation of the legislative history of PASPA and respectfully refers the Court to PASPA's legislative history for a complete recitation of the statements made in various committee meetings.

10. The NJTHA agrees in part with the statement made in Paragraph 10 of Plaintiffs' Statement. It would be more accurate, however, to quote the entire amendment to Article IV, Section VII, paragraph 2 of the New Jersey Constitution for a full recitation of its terms.

11. The NJTHA agrees in part with the statement made in Paragraph 11 of Plaintiffs' Statement. It would be more accurate, however, to quote the entire former version of Article IV, Section VII, paragraph 2 of the New Jersey Constitution (before the December 2011 amendment) for a full recitation of its terms.

12. The NJTHA agrees in part with the statement made in Paragraph 12 of Plaintiffs' Statement. It would be more accurate, however, to quote the entire amendment to Article IV, Section VII, paragraph 2 of the New Jersey Constitution for a full recitation of its terms.

13. On information and belief, the NJTHA agrees with the statement made in Paragraph 13 of Plaintiffs' Statement.

14. The NJTHA agrees with the statement made in Paragraph 14 of Plaintiffs' Statement.

15. The NJTHA agrees in part with the statements made in Paragraph 15 of Plaintiffs' Statement. It would be more accurate, however, to quote the entire Sports Gambling Law referenced therein for a complete recitation of its provisions.

16. The NJTHA agrees in part with the statements made in Paragraph 16 of Plaintiffs' Statement. It would be more accurate, however, to quote the entire Sports Gambling Law referenced therein for a complete recitation of its provisions.

17. The NJTHA agrees in part with the statements made in Paragraph 17 of Plaintiffs' Statement. It would be more accurate, however, to quote the entire Sports Gambling Law referenced therein for a complete recitation of its provisions.

18. The NJTHA agrees in part with the statements made in Paragraph 18 of Plaintiffs' Statement. It would be more accurate, however, to quote the entire Sports Gambling Law referenced therein for a complete recitation of its provisions.

19. On information and belief, the NJTHA agrees with the statement made in Paragraph 19 of Plaintiffs' Statement.

20. On information and belief, the NJTHA agrees with the statement made in Paragraph 20 of Plaintiffs' Statement.

21. On information and belief, the NJTHA agrees with the statement made in Paragraph 21 of Plaintiffs' Statement.

22. The NJTHA disagrees with the statement made in Paragraph 22 of Plaintiffs' Statement inasmuch as it is an inaccurate description of a statement made in the article referenced in Paragraph 22 of Plaintiffs' Statement and the NJTHA respectfully refers the Court to that article for the complete report made therein and for the full statements that were purportedly made by the individuals quoted therein.

SUPPLEMENTAL STATEMENT OF MATERIAL FACTS

23. The NJTHA has more than 3,000 members, consisting of thoroughbred horse owners and horse trainers from around the world. Verified Answer and Affirmative Defenses ¶36.

24. The NJTHA is also the licensed operator and permit holder of Monmouth Park Racetrack, a thoroughbred racetrack located in Oceanport, New Jersey ("Monmouth Park"). Id.

25. As a racetrack operator and permit holder the NJTHA has the legal right, pursuant to New Jersey law, subject to the regulations of the New Jersey Division of Gaming Enforcement and the New Jersey Racing Commission, to engage in the business of accepting wagers on the results of certain professional and amateur sports events. Id.

26. The NJTHA intends to exercise its legal right to accept wagers on the results of certain professional

and amateur sports events pursuant to New Jersey law, subject to the regulations of the New Jersey Division of Gaming Enforcement and the New Jersey Racing Commission. Id.

27. On or about October 28, 1992, Congress enacted the Professional and Amateur Sports Protection Act ("PASPA"), codified at 28 U.S.C. §3701, *et seq*.

28. Prior to the enactment of PASPA, the United States Department of Justice, in letters dated September 24, 1991 to then Senator Joseph Biden, then Chairman of the Senate Judiciary Committee, and then Senator Dennis DeConcini, a then member of the Senate Judiciary Committee, formally opposed enactment of PASPA based on the fact that, inter alia, PASPA raised federalism issues for the reasons that it was an intrusion by the federal government upon the States' sovereign rights to decide how to raise revenues for themselves; to decide for themselves what gambling policies to enact; and because PASPA empowered private sports organizations to enforce PASPA's provisions by suing States in federal courts. Verified Answer and Affirmative Defenses, Exhibits C and D.

29. Thoroughbred racing in New Jersey provides substantial economic and other benefits to the general public, creates employment opportunities for thousands of people, and generates substantial revenues for the State of New Jersey. Verified Answer and Affirmative Defenses ¶48.

30. Monmouth Park is an integral part of all aspects of the equine industry in New Jersey. Id.

31. If Monmouth Park is forced to close it will mean the death of the thoroughbred racing industry in New Jersey. Id.

32. Wagering on New Jersey Thoroughbred and Standardbred horse races in New Jersey has waned in recent years resulting in the loss of jobs as well as causing economic distress to the equine industry in New Jersey, especially to Monmouth Park. Verified Answer and Affirmative Defenses ¶49.

33. The NJTHA believes that sports betting is an essential component of the NJTHA's overall plan to make Monmouth Park an economically self-sustaining Thoroughbred Racetrack, better able to compete with racetracks in surrounding States that are bolstered by casino revenues. Id.

34. The New Jersey equine industry is critical to New Jersey's economy and the preservation of open space in New Jersey. In a Report, prepared by Karyn Malinowski, Ph.D. of the Rutgers Equine Science Center, it was concluded that if racing-related and breeding farms in New Jersey were to cease operations it would have a $780 million negative annual impact, put 7,000 jobs in danger, eliminate $110 million in tax revenues, and leave over 163,000 acres of open space vulnerable to future development. Verified Answer and Affirmative Defenses ¶50.

35. The competitive disadvantages created by PASPA's exemption, in favor of four (4) States, from PASPA's prohibition against sports betting, especially neighboring Delaware, has combined with other fac-

tors to put the New Jersey horse industry, and Monmouth Park in particular, at such a severe disadvantage that the economic viability of the New Jersey horse industry and Monmouth Park has been and continues to be seriously damaged. Verified Answer and Affirmative Defenses ¶51.

36. On November 8, 2011 New Jersey citizens, by a 64% - 36% margin, voted to amend the New Jersey Constitution so as to authorize the New Jersey Legislature to enact a law allowing wagering on certain sporting events at Atlantic City casinos and at horse racetracks in New Jersey, including Monmouth Park. Verified Answer and Affirmative Defenses ¶52.

37. The voter referendum, approved by New Jersey voters, provided as follows:

"Shall the amendment to Article IV, Section VII, paragraph 2 of the Constitution of the State of New Jersey, agreed to by the Legislature, providing that it shall be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City and at current or former running and harness horse racetracks on the results of professional, certain college, or amateur sport or athletic events, be approved?"

Id.

38. On December 8, 2011, Article IV, Section VII, paragraph 2 of the New Jersey Constitution was amended in conformity with the voter referendum. Verified Answer and Affirmative Defenses ¶53.

39. The Amendment provides:

> It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place;
>
> * * *
>
> It shall also be lawful for the Legislature to authorize by law wagering at current or former running and harness horse racetracks in this State on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place.

N.J. Const. art. IV, §7, cl. 2(d) and 2(f).

40. On January 17, 2012 the Governor of New Jersey signed into law an Act supplementing Title 5 of the Revised Statutes and amending P.L. 1977, C. 110 and P.L. 1992, C. 9, "permitting wagering at casinos and racetracks on the results of certain professional or collegiate sports or athletic events" (hereinafter "New Jersey's Sports Betting Law"). Verified Answer and Affirmative Defenses ¶54.

41. It is contemplated that a portion of the tax revenues generated from New Jersey's Sports Betting Law will be used to benefit senior and disabled New Jersey citizens as well as help to offset New Jersey State budget shortfalls. Id.

42. It is further contemplated that profits from New Jersey's Sports Betting Law will promote the economic survival of Monmouth Park, the profitability of New Jersey casinos, the economic viability of the New Jersey horse industry, and the creation of jobs. Id.

43. There is an actual threat of an injunction being entered against the NJTHA based on the NJTHA's decision to conduct wagering on sports events at Monmouth Park pursuant to New Jersey's Sports Betting Law and implementing regulations. Verified Answer and Affirmative Defenses ¶55.

44. Declaratory relief is necessary to assist the NJTHA in its ability to make responsible decisions about its future as it moves forward with its plans to implement sports wagering in accordance with New Jersey's Sports Betting Law and implementing regulations. Id.

45. The actual threat of an injunction against the NJTHA is based on this lawsuit filed by the Plaintiffs herein seeking Declaratory and Injunctive Relief. Id.

Respectfully submitted,

McElroy, Deutsch, Mulvaney & Carpenter, LLP

By: /s/ Ronald J. Riccio
Ronald J. Riccio
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Post Office Box 2075
Morristown, New Jersey
07962-2075
(973) 993-8100

Attorneys for Defendant-Intervenor
New Jersey Thoroughbred Horsemen's Association, Inc.

Dated: December 13, 2012

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	C.A. NO. 3:14-cv-6450 Honorable Michael A. Shipp, U.S.D.J. Honorable Lois H. Goodman, U.S.M.J.

CERTIFICATION OF MICHAEL MUSTO, EXECUTIVE DIRECTOR OF THE NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION

MICHAEL MUSTO, of full age, certifies as follows:

1. I am the Executive Director of the New Jersey Thoroughbred Horsemen's Association, hereinafter referred to as "NJTHA" and make this Certification in opposition to an application made by the NCAA, NBA, NHL, NFL and Major League Baseball for a Temporary Restraining Order attempting to stop Monmouth Park from accepting sports wagers on October 26.

2. The NJTHA took over the exclusive operations of Monmouth Park Racetrack from the NJ SEA in 2012 following Governor Christie's decision to privatize Monmouth Park Racetrack. The NJTHA has the exclusive right to, and does in fact, use, occupy and

operate the racetrack premises and has the exclusive right to, and does in fact, manage the business affairs and any related enterprises at Monmouth Park.

3. The NJTHA has a long term management agreement with Darby Development, LLC. This agreement gives Darby Development, LLC the right to exclusively manage Monmouth Park Racetrack, develop the racetrack properties and manage and operate any additional gaming business for revenue generating purposes at Monmouth Park.

4. The horseracing industry in New Jersey is going through hard times. When the decision was made by the State to privatize racing, Monmouth Park was on the verge of being closed. The only chance of preserving live thoroughbred racing in the State was for the NJTHA to undertake a losing venture and attempt to turn it around. The State was losing $12 million a year when the decision was made to privatize the track. Although the operational losses from Monmouth Park have been significantly reduced, the track still experiences heavy losses. We have been holding on for years hoping to obtain alternative revenue sources. There are no state subsidies.

5. The only business revenue stream which can save Monmouth Park at the present time is revenue from sports betting.

6. In anticipation of being able to offer sports betting in the State of New Jersey, the NJTHA entered into an agreement with the leading sports betting company in the world, William Hill. I attach hereto as Exhibit A the memorandum prepared by

William Hill which describes the business operations of William Hill.

7. Monmouth Park, through the NJTHA, is the founding member of a private regulatory body called The Independent Sports Wagering Association. The Association is designed to provide integrity and protect the public with respect to sports betting. We have communicated with the other racetracks and casinos. They have been invited to join the Association if and when they elect to participate in sports betting.

8. Monmouth Park will suffer significant irreparable harm if this Court, even temporarily, enjoins its planned commencement of sports gambling on October 26, 2014. Monmouth Park has publicly announced that beginning October 26, 2014 there will be sports betting at the racetrack. As many as 10,000 patrons are expected to visit Monmouth Park on that day to engage in sports betting. This is a major event in Monmouth Park's history and represents the beginning of a renaissance for the track. Elaborate plans have been made involving hundreds of workers and thousands of dollars. If this event is enjoined, negative repercussions will ensue, including a loss of credibility for Monmouth Park, damage to its good will, and a stain on its reputation from which it would be difficult to recover.

9. Acting Attorney General, John Hoffman, issued Law Enforcement Directive #2014-1, after which Anthony Dreyer, Counsel for the Sports Leagues, requested that Monmouth Park provide him with a letter agreeing to stand down from accepting sports wa-

gers for 45 days in order to facilitate the League's filing an application to the court with respect to sports betting. On September 10, 2014, Monmouth Park Racetrack furnished Mr. Dreyer with a letter dated September 10, 2014, attached as Exhibit B, agreeing not to begin accepting sports wagers sooner than 45 days from September 10, 2014. Given that we provided the Leagues with a 45 day moratorium and the Leagues clearly knew that we would only stand down for 45 days, it would cause irreparable harm to Monmouth Park and the NJTHA for the Leagues at this late juncture to seek a TRO. In anticipation of accepting sports wagers on October 26, the NJTHA put into full operation a plan to be ready by October 26, including, but not limited to, hiring personnel to operate the sports betting operation, purchasing equipment, ordering phone lines, internet connections, developing protections for the public, rules and regulations for private regulation, putting a team together for the operational end to provide security to protect the public and operate effectively as well as spending additional significant costs to prepare to offer bets beginning Sunday, October 26, 2014.

10. I respectfully request Your Honor deny the Leagues' application for a Temporary Restraining Order.

I certify under penalty of perjury that the foregoing is true and correct.

Dated: October 22, 2014

_____

MICHAEL MUSTO
Executive Director, NJTHA

EXHIBIT A

Overview of William Hill

- Leading sports betting company in the world, founded in 1934
- Licensed and regulated in UK, Gibraltar, Australia, Italy, Spain, US
- Additional operations in Bulgaria, Israel and Philippines
- Leading US sports book operator, licensed by Nevada Gaming Commission
- Operate 103 sports books; 55% of Nevada locations
- Nevada's leading mobile sports betting application
- Technology provider to most major Nevada casinos
- Exclusive risk manager for Delaware Sports Lottery
- Agreement with Monmouth Park
- Listed on the London Stock Exchange (WMH.L)
- Market Capitalization $5bn
- FY13 Revenue $2.5bn, FY13 Operating Profit $560m
- $13bn wagered in 2013
- A household name in the UK
- No. 1 operator of betting shops in the UK with over 2,400 shops
- Leading online operator
- 17,000 employees worldwide; over 400 in US

EXHIBIT B

MONMOUTH PARK

September 10, 2014

Mr. Dreyer,

We can state affirmatively that Monmouth Park/ Darby Development LLC has no plans to begin operating a sports pool immediately, and will not begin operating a sports pool sooner than 45 days from today.

Respectfully,

Robert J. Kulina
President
Monmouth Park Racetrack

McElroy, Deutsch, Mulvaney & Carpenter, LLP
1300 Mount Kemble Avenue
Post Office Box 2075
Morristown, New Jersey 07962-2075
(973) 993-8100
Attorneys for New Jersey Thoroughbred Horsemen's Association, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al, Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al., Defendants	C.A. NO. 3:14-cv-6450 Honorable Michael A. Shipp, U.S.D.J. Honorable Lois H. Goodman, U.S.M.J. **CERTIFICATION OF ROBERT J. KULINA IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER**

ROBERT J. KULINA, of full age, hereby certifies as follows:

1. I am President of Darby Development, LLC, a management company, acting on behalf of the New Jersey Thoroughbred Horsemen's Association, hired

to operate Monmouth Park Racetrack. I submit this Certification in opposition to the application by plaintiffs for a temporary restraining order. I am familiar with the facts and information set forth herein.

2. Monmouth Park was founded in 1870 and has been in continuous operation since 1946. It is a highly respected attraction in New Jersey and is regarded as one of the premier facilities in North America. Patrons hold high expectations for Monmouth. Failure to offer sports wagering on October 26, 2014 would be damaging to Monmouth's reputation.

3. On or about October 17, 2014, Monmouth Park announced it would begin taking sports bets on October 26, 2014. Since that time, immense national media attention has been attracted, including, but not limited to, the Associated Press, *The New York Times*, ABC News, CBS News, Fox News, NBC News, ESPN and Social Media (Facebook and Twitter). In light of the extensive media coverage and public expectation of sports wagering at Monmouth Park on October 26, 2014, any failure to fulfill that expectation will significantly hurt our ability to operate in the future, damage our credibility and have a materially adverse dollar effect on our business operations.

4. Considerable staffing needs have been allocated not only in preparation for October 26, 2014, including, but not limited to: carpenters, electricians, ticket-takers, wagering supervisors, cleaning, security, and guest services, all who have, and continue to work tirelessly to prepare Monmouth Park for a crowd that could easily exceed 10,000 people. Additionally,

outside police preparations have been made regarding traffic and patron control.

5. Patron security is paramount at Monmouth Park. If wagering is enjoined, thousands of patrons may still come to Monmouth on October 26, 2014, unbeknownst that sports wagering will not take place. It is reasonable to assume that some of these patrons could become unruly. This has potentially dangerous consequences and would need to be monitored closely by security/police. These patrons are not likely to visit Monmouth Park again.

I certify under penalty of perjury that the foregoing is true and correct.

ROBERT KULINA

Dated: October 21, 2014

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al, Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al,: Defendants.	C.A. NO. 3:14-cv-6450 Honorable Michael A. Shipp, U.S.D.J. Honorable Lois H. Goodman, U.S.M.J. **CERTIFICATION OF DENNIS A. DRAZIN IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER**

DENNIS A. DRAZIN, of full age, hereby certifies as follows:

1. I am the advisor to NJTHA and Monmouth Park Racetrack.

2. Based on publicly-available information from the Nevada Gaming Control Board, my understanding is that approximately $3,622,000,000 was legally wagered on sports events during 2013 at Nevada sports books and approximately $202,838,000 was won by Nevada sports books in 2013.

3. On information and belief, a mature New Jersey sports betting market would be approximately three times the size of the Nevada market once sports betting is fully-implemented at New Jersey's racetracks and casinos.

4. I have prepared a chart, which is attached as Exhibit A, that shows the weekly profits that Monmouth Park would lose if it is not permitted to commence accepting sports wagers on October 26.

5. Based on the foregoing, I estimate that the lost weekly profit to Monmouth Park in the event sports wagering is not permitted to commence on October 26 is $1,170,219.

I certify under penalty of perjury that the foregoing is true and correct.

_____

Dennis A. Drazin

Dated: October 22, 2014

EXHIBIT A

Nevada Handle 2013		$3,622,107,143	Margin
Nevada Win 2013		$202,838,000	5.6%
NJ - 3x Nevada handle		$10,866,321,429	
NJ - 3X Nevada win		$608,514,000	
Monmouth Share - 10% Handle		$1,086,632,143	
Monmouth Share - 10% Win		$60,851,400	
Monmouth Share - Handle	Weekly	$20,896,772	
Monmouth Share - Win	Weekly	$1,170,219	

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NUMBER:
3:12-cv-04947-MAS-LHG
3:14-cv-14-6450-MAS-LHG

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, NATIONAL BASKETBALL ASSOCIATION, a joint venture, NATIONAL FOOTBALL LEAGUE, an unincorporated association, NATIONAL HOCKEY LEAGUE, an unincorporated association, and OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball,

Plaintiffs,

-vs-

CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission, NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC., and NEW JERSEY SPORTS AND EXPOSITION AUTHORITY,

Defendants.

Clarkson S. Fisher United States Courthouse
402 East State Street
Trenton, New Jersey 08608
October 24, 2014

B E F O R E: HONORABLE MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

SKADDEN, ARPS, SLATE, MEAGHER & FLOM,
ESQUIRES BY: JEFFREY MISHKIN, ESQUIRE

and

ANTHONY J. DREYER, ESQUIRE
Attorneys for the Plaintiffs.

MCCARTER & ENGLISH, ESQUIRES
BY: RICHARD HERNANDEZ, ESQUIRE

and

WILLIAM J. O'SHAUGHNESSY, ESQUIRE
Attorneys for the Plaintiffs.

GIBSON, DUNN & CRUTCHER, ESQUIRES
BY: MATTHEW MCGILL, ESQUIRE
Attorneys for the Defendant.

OFFICE OF THE ATTORNEY GENERAL
BY: JEFFREY JACOBSON, ESQUIRE
Attorneys for the Defendant.

MCELROY, DEUTSCH, MULVANEY & CARPENTER, ESQUIRES
BY: RONALD J. RICCIO, ESQUIRE
Attorneys for the Defendant.

GIBBONS, PC
BY: MICHAEL R. GRIFFINGER, ESQUIRE
and
THOMAS VALEN, ESQUIRE
Attorneys for the Defendant.

Certified as True and Correct as required by Title 28, U.S.C., Section 753

/S/ Cathy J. Ford, CCR, CRR, RPR

DECISION

[3] (Attorneys are in attendance via telephone conference.)

THE DEPUTY COURT CLERK: All rise.

(Open court begins at 4:42 p.m.)

THE COURT: Please be seated. Good afternoon.

We are here, and we are on the record, in the matter of the NCAA versus Chris Christie, Docket Number 12-4947 and Civil Action Number 14-6450.

Who's on the line today for the plaintiff Leagues?

MR. MISHKIN: Your Honor, it's Jeffrey Mishkin and Anthony Dreyer from Skadden Arps for the plaintiffs in both actions.

MR. HERNANDEZ: Your Honor, you also have Richard Hernandez from McCarter and English for the plaintiffs on both actions.

MR. O'SHAUGHNESSY: William O'Shaughnessy from McCarter also, Judge.

THE COURT: Who's on for the state defendants?

MR. MCGILL: Your Honor, this is Matthew McGill from Gibson, Dunn and Crutcher for the state defendants. And I'm joined by Jeffrey Jacobson from the Division of Law, Office of the Attorney General.

THE COURT: Who's on for the Horsemen's Association?

MR. RICCIO: Your Honor, it's Ron Riccio. We are here on 6450. Also, Elliott Berman and Mr. Drazin who is [4] representing the client. He is a client and he's appearing as a person of the client.

THE COURT: Who's on for the Sports and Exposition Authority?

MR. GRIFFINGER: Your Honor, Michael Griffinger, Peter Torcicollo and Thomas Valen from Gibsons. And we're also on behalf of the legislature defendants.

THE COURT: Is there anyone else on the line today that wants to enter an appearance?

MR. PHIBBS: Your Honor, this is Peter Phibbs from the United States Department of Justice, Civil Division just to inform the Court that we are on the line.

THE COURT: Okay. Well, as I've indicated in the text order that I issued earlier today, there will be no oral argument in this matter. I have read the papers and I'm going to put my decision on the record at this time.

As provided in the Court's text order, the Court will not hear oral argument and it will move directly to ruling on the plaintiffs' application for a temporary restraining order. Due to the emergent nature of plaintiffs' application, the Court scheduled this conference to place a decision on the record. Please note: For purposes of expediency, I will not read all of the citations onto the record. The citations will be included in full on the actual transcript, which you may order.

[5] **1. Preliminary Statement**

Sports betting at New Jersey's casinos and racetracks continues to be a priority for the state. Sports betting has garnered the support of voters, legislators from across both sides of the aisle, and Governor

Christie. In 2012, New Jersey enacted a Sports Wagering Law, N.J. Stat. Ann. Section 5:12A-1 *et seq.*

On February 28, 2013, after careful consideration of the positions advanced during the course of high-quality litigation, this Court found in what we're calling "*Christie I*" that New Jersey's 2012 Sports Wagering Law conflicted with the Professional and Amateur Sports Protection Act, or PASPA, and entered a permanent injunction. The Third Circuit affirmed this Court's decision. In its de novo review, the Third Circuit discussed New Jersey's ability to repeal its prohibitions on sports wagering. The United States Supreme Court declined to hear the appeal.

On September 8, 2014, New Jersey's Acting Attorney General issued a Law Enforcement Directive to all New Jersey law enforcement personnel regarding the 2012 Sports Wagering Law. The Directive concluded that, based on the severability provision of the 2012 Sports Wagering Law, the central provisions of the Law that establish that casinos or racetracks may operate sports pools remain in effect and exempted such activity from criminal and civil liability. [6] (Defs.' Clarification/Modification Motion 1-2, 12-4947, ECF No. 161.) On the same day, defendants filed a motion requesting that the Court clarify its injunction or modify its injunction to conform to the Third Circuit's decision. (Id. At 8-9.) Defendants then secured a moratorium on the implementation of the Directive. The moratorium is scheduled to expire tomorrow, October 25, 2014.

On October 9, 2014, one day before the due date on its clarification reply brief, the state requested an extension until October 17, 2014 to file its brief. (Oct. 9, 2014 Request 2, 12-4947, ECF No. 168.) According to the state, "defendants' extension [was] warranted

because plaintiffs and intervenor filed two separate briefs raising a number of new arguments, including several issues of fact that require investigation." The Court granted the state's request for an extension.

The state did not submit its reply brief on October 17th. Rather, on October 17th the state filed correspondence at 3:58 p.m. that withdrew its motion for clarification or modification. In addition, the state notified the Court that Governor Christie signed into New Jersey Senate Bill 2460, what I'm calling the 2014 law. According to the state, the Law repealed all state laws and regulations that previously barred certain sports wagering activities at consenting casinos and racetracks in New Jersey [7] by persons 21 years of age and older. (Oct. 17, 2014 Ltr., ECF No. 173.) The present litigation, what I'm calling "*Christie II*," ensued.

2. Procedural History here as to the TRO

On Monday, October 20, 2014 with the moratorium on sports gambling set to expire in one week and no indication that defendants would be willing to secure an extension, plaintiffs filed a Verified Complaint. On Tuesday, October 21, 2014, the Court conducted a telephone status conference on the record regarding the briefing schedule for plaintiffs' application for temporary restraints. During the conference, counsel for the New Jersey Thoroughbred Horsemen's Association, or NJTHA, confirmed that Monmouth Park planned to start accepting bets on Sunday, October 26, 2014. Plaintiffs filed an Order to Show Cause with temporary restraints at 3:03 p.m. on Tuesday, October 21st, in both *Christie I* and *Christie II*. The New Jersey Sports and Exposition Authority, or NJSEA, the NJTHA, and the state defendants sub-

mitted their briefs in opposition in *Christie II* on October 22, 2014 at 10:16 p.m., 11:27 p.m. and 11:47 p.m., respectively. The legislature defendants submitted an opposition brief in *Christie I* at 11:30 p.m. Plaintiffs submitted their reply brief in both matters on October 23, 2014 at 3:42 p.m. As such, the parties afforded the Court an extremely limited amount of time to render this decision. Accordingly, the Court is issuing an [8] oral opinion in lieu of a written decision.

3. The TRO

Preliminary injunctive relief is "an extraordinary remedy" and "should be granted only in limited circumstances." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004)(citation omitted). The grant or denial of a temporary restraining order is within the discretion of the Court. *See West Indian Co., Ltd. v. Gov't of Virgin Islands*, 812 F.2d 134, 135 (3d Cir. 1987).

"One of the goals of the [temporary restraining order] analysis is to maintain the status quo, defined as the last, peaceable, noncontested status of the parties." *Kos Pharm., Inc.*, 369 F.3d at 708 (citation and quotation omitted.) In order to obtain a temporary restraining order, the movant has the burden of showing: (1) a reasonable likelihood of success on the merits; (2) irreparable injury if relief is denied; (3) public interest in favor of the temporary restraining order; and (4) a balance of hardships in its favor. *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013).

While a temporary restraining order is an extraordinary remedy, after consideration of the papers submitted and in light of these four factors, the Court con-

cludes that plaintiffs are entitled to a temporary restraining order to maintain the status quo pending full [9] consideration of their application for a preliminary injunction.

A. Likelihood of Success on the Merits

The Court must determine whether plaintiffs have shown that they are reasonably likely to succeed on the merits. This requires "a showing of a reasonable probability, not the certainty, of success on the merits. *SK & F, Co. v. Premo Pharm. Labs., Inc.*, 625 F.2d 1055, 1066 (3d Cir. 1980). Plaintiffs contend that the 2014 Law violates the restrictions imposed by PASPA, as delineated by the Third Circuit. Thus, the Court, in evaluating the merits of plaintiffs' claim, is guided by the Third Circuit's decision in *Christie I*, 730 F.3d 208 (3d Cir. 2013).

As did the Third Circuit, the Court begins its analysis of the merits with a review of PASPA. PASPA states that:

> [i]t shall be unlawful for. . . a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact. . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly. . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

[10] 28 U.S.C. Section 3702. As the Third Circuit highlighted, "PASPA's purpose is to 'prohibit sports gambling conducted by, or authorized under the law of, any state or governmental entity' and to 'stop the

spread of state-sponsored sports gambling." *Christie I*, 730 F.3d at 216.

In *Christie I*, this Court and the Third Circuit held that PASPA was constitutional. In so doing, both courts held that PASPA did not violate the anti-commandeering principle derived from the Tenth Amendment. In explaining the reach of the anti-commandeering principle, the Court outlined what a state legislature may or may not do under the terms of PASPA. The Third Circuit, in interpreting PASPA, determined that the law does not require New Jersey to maintain its own prohibition on sports betting, and therefore, the law does not violate the anti-commandeering principle. Instead, according to the Third Circuit, New Jersey may either maintain its prohibition, or it may repeal it. By presenting the state with this choice, the Third Circuit held that the law did not require the state to take any affirmative action and thus does no impinge on its sovereignty.

Defendants advance the position that the Third Circuit's reading of PASPA permits New Jersey to repeal its prohibition on sports betting and allow sports betting in the state, but only in such a way that certain rules are kept in place. There can be no dispute that the 2014 Law is styled as [11] a "repeal," and as a result, at first blush, it appears to be an attempt to comply with the Third Circuit's interpretation of PASPA in Christie I. Yet, as plaintiffs argue, the 2014 Law repeals prohibitions on sports wagering in the state only so much, so that the state may keep some restrictions over the activity. The 2014 Law contains several exclusions from its repeal, with the resulting effect that: (1) no one under the age of 21 may bet on sports; (2) sports betting is not permitted anywhere but in Atlantic City casinos or current or former horse

racetracks; (3) betting is not permitted on college games in New Jersey; and (4) betting is not permitted on college teams from New Jersey. The 2014 Law, however, says nothing in regards to the other generally applicable gaming regulations under which sports betting in New Jersey will likely fall.

Plaintiffs argue that the limitations of the 2014 Law are contrary to the Third Circuit's holding in *Christie I*, which stated that a lawful repeal necessitated a "complete deregulation of that field," and thus the state has lent its imprimatur to sports betting in contravention of the policy behind PASPA. In their opposition briefs, defendants argue that plaintiffs may not now rely on a different interpretation of PASPA than the one they, and the United States, relied on in *Christie I*. Defendants assert that plaintiffs' current position in *Christie II* may be contrary to a position offered [12] by the United States in *Christie I*. The United States is not a party to this matter and defendants have not demonstrated that the Leagues should be bound to the United States' arguments in Christie I on this emergent application for a temporary restraining order.

At this stage of the proceedings, the Court cannot read the Third Circuit's opinion in *Christie I* in such a way as to render the purpose of PASPA null. Accordingly, the Court finds that plaintiffs have established a reasonable likelihood of success on the merits with respect to the violation of PASPA, and as a result the Court need not consider whether plaintiffs have demonstrated a likelihood of success on its other claims.

B. Irreparable Harm

The Court must also consider the extent to which plaintiffs will suffer irreparable injury if the temporary restraining order is denied. "Grounds for irreparable injury include loss of control of reputation, loss of trade, and loss of good will," as well as the likelihood of confusion. *Pappan Enter., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 805 (3d Cir. 1998). Irreparable harm "must be of a peculiar nature, so that compensation in money [alone] cannot atone for it." *Morton v. Beyer*, 822 F.2d 364, 372 (3d Cir. 1987)(citation omitted). "[M]ore than a risk of irreparable harm must be demonstrated." *Cont'l Group, Inc. v. Amoco* [13] *Chems. Corp.*, 614 F.2d 351, 359 (3d Cir. 1980). Instead, "a clear showing of immediate irreparable injury or a presently existing actual threat" is needed. *Amoco Chems. Corp.*, 614 F.2d at 359 (citation omitted). Although the Third Circuit has found that a showing of potential harm to a plaintiff's reputation may be insufficient alone to warrant a preliminary injunction, when the reputation of the plaintiff is "directly endangered by the defendant's actions," reputational injury may constitute irreparable harm. *Bennington Foods LLC v. St. Croix Renaissance, Grp., LLP*, 528 F.3d 176, 179-80 (3d Cir. 2008).

The Third Circuit has already confirmed the constitutionality of PASPA. PASPA's purpose is clear: "to 'prohibit sports gambling conducted by, or authorized under the law of, any state or governmental entity' and to 'stop the spread of state-sponsored sports gambling." *Christie I*, 730 F.3d at 216. In this action, plaintiffs again allege that defendants are violating federal law. This Court has already issued a permanent injunction against some of the defendants prohibiting

their violation of PASPA. Constitutional and statutory violations often cannot be adequately remedied through damages and therefore generally constitute irreparable harm.

Moreover, plaintiffs have been faced with an actual threat - the NJTHA will accept sports wagering at Monmouth [14] Park beginning this Sunday under the authority of the 2014 Law. Plaintiffs assert that irreparable harm will result to their reputation because sports betting on their own games will result in a negative effect on the perception of their games and the relationships with their fans. This assertion of reputational harm is a very real harm that would be a direct result of sports wagering on plaintiffs' games caused by defendants. The Third Circuit, and this Court, have already found, in the context of standing, "a link between legalizing sports gambling and harm to the integrity of [plaintiffs'] games," and a resulting increase in a negative perception or reputation associated with plaintiffs. *Christie I*, 730 F.3d at 221. The Court recognizes the differences in the standards used to constitute "injury" in the standing context and a TRO analysis. Yet, the record of *Christie I*, including the Third Circuit and this Court's opinions, is "replete with evidence" showing that plaintiffs' association with gambling is stigmatizing. *See Id.*

Additionally, the Third Circuit found "a clear link between the [2012] Sports Wagering Law and increased incentives for game-rigging." Id. This same link exists for the 2014 Law, as well. "Thus, more legal gambling leads to more total gambling, which in turn leads to an increased incentive to fix or attempt to fix [plaintiffs'] matches." *Id.* This spread of sports betting "would engender the very [15] ills that PASPA sought

to combat." Office of the Commissioner of *Baseball v. Markell*, 579 F.3d 293, 304 (3d Cir. 2009).

Furthermore, the Court agrees with plaintiffs that the bounds of the 2014 Law belies any argument that plaintiffs are not injured by gambling on their games, as the new law itself carves out a prohibition on sports wagering on collegiate athletic contests occurring in the state or involving New Jersey colleges.

Accordingly, the Court finds that plaintiffs have shown irreparable harm, and this factor weighs heavily in favor of granting the temporary restraining order.

C. Balance of Equities

The Court must also balance the irreparable harm to be suffered by plaintiffs against any potential harm to be suffered by defendants. Defendants set forth a plethora of harmful results that will occur if the Court grants plaintiffs' request for a temporary restraining order.

While defendants may suffer some harm as a result of a temporary restraining order, much of this harm is self-inflicted. Based on this Court's and the Third Circuit's opinions, and the novel approach of the state in drafting the 2014 Law, defendants could, and should have, anticipated potential hurdles towards implementing sports betting at casinos and racetracks. The NJTHA claims that it has expended great sums of money in preparation for sports betting to [16] commence on October 26th. However, the NJTHA could have easily awaited this Court's decision on the validity of the 2014 Law prior to taking such steps.

In sum, the Court is not convinced defendants will suffer the grave injury that they have alleged in their opposition papers should the status quo be preserved

and New Jersey residents are temporarily prevented from engaging in sports betting at Monmouth Park this Sunday.

D. Public Interest

Last, the Court must consider whether the issuance of a temporary restraining order serves the public interest. In cases involving matters of special concern to the public, such as this matter, the public interest weighs heavy in determining the appropriateness of injunctive relief. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *Yakus v. United States*, 321 U.S. 414, 441 (1944).

In *Christie I*, the Third Circuit stated that "this case is made difficulty by [Appellants'] strong arguments in support of New Jersey's law as a policy matter." *Christie I*, 730 F.3d at 215 (quotations omitted). This Court acknowledges the same. Nevertheless, the Third Circuit also stated "our duty is to say what the law is." *Id.* (quotations omitted). Indeed, as far as public interest is concerned, the public is served when courts can provide certainty in the law. Citizens deserve to know whether the act they are about to commit is [17] illegal or in violation of federal policy. When states act in contravention of federal policy, the legitimacy of federal laws is necessarily thrown into question.

More fundamentally, the public interest is served by preserving the "status quo. . . until the merits of a serious controversy can be fully considered by" the court. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 197 (4th Cir. 1977), overruled on other grounds by *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346-47 (4th Cir. 2009). Here, the Court has been given limited time to resolve

a question of the utmost public interest both for the citizens of New Jersey and other states who may seek to permit sports betting within their borders.

Accordingly, the public interest factor weighs in favor of issuing a temporary restraining order.

E. Conclusion

In sum, this Court must weigh all four factors in their totality in deciding if a temporary restraining order must issue. This Court and the Third Circuit have already determined PASPA to be constitutional. Plaintiffs now seek to prevent the potential violation of that law. The Court finds that the preservation of the status quo is necessary and of paramount importance. Therefore, plaintiffs' application for a temporary restraining order is granted.

4. Bond

[18] In their moving brief, plaintiffs assert that there is no cognizable harm to defendants from the issuance of a temporary restraining order. Therefore, they request the Court to exercise its discretion and dispense with the bond requirement. (Pls.' Moving Br. 27, ECF No. 27.) NJTHA argues that plaintiffs ignore the plain language of Federal Rule of Civil Procedure 65 and that a court may only dispense with the bond requirement under narrowly drawn circumstances. In their reply brief, plaintiffs did not respond to NJTHA's bond-related arguments.

Federal Rule of Civil Procedure 65(c) provides that "[t]he court may issue a preliminary injunction or temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."

The law in this Circuit is clear - when a risk of financial harm exists for the party to be enjoined, the posting of a security bond is required. *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 426 (3d Cir. 2010). "Although the amount of the bond is left to the discretion of the court, the posting requirement is much less discretionary," and the requirement is almost mandatory. *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988). An extremely narrow exception exists only "when complying [19] with the preliminary injunction raises no risk of monetary loss to the defendant." *Zambelli Fireworks Mfg. Co.*, 592 F.3d at 426.

Plaintiffs have not established, nor even argued, why this temporary restraining order raises no risk of monetary loss to the NJTHA. Here, the Court finds a bond appropriate. The amount of the bond is within the discretion of the court. *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 210 (3d Cir. 1990). In keeping with the policies of reimbursement and protection which underlie the bond requirement, Rule 65(c) also provides that the bond is for the payment of costs and damages as may be incurred or suffered by a party wrongfully restrained. Federal Rule of Civil Procedure 65(c). In exercising its discretion, this Court finds it appropriate to set the bond on the high side to avoid any potential loss to defendants. Therefore, plaintiffs must post a bond in the amount of $1,700,000.

If defendants assert they pose a risk of harm greater than the value of the bond currently set, they may make an application to this Court to increase the bond amount.

The Court will enter both an Order consistent with this bench opinion and a Scheduling Order for

the pending preliminary injunction by close of business day. That's all we have for this matter today. I thank counsel for appearing telephonically on such short notice and we will try and get [20] this Order posted on short notice.

MR. RICCIO: Your Honor may, I ask a question. This is Ron Riccio.

THE COURT: Sure. Hello. You had a question?

MR. RICCIO: Judge Shipp?

THE COURT: Can you hear me?

MR. RICCIO: Yes, I can hear you now. I was unclear whether the scope of your injunction is limited to the plaintiffs' games and not other sporting contests that the plaintiffs have no interest in.

THE COURT: Well, right now the only -- the scope is limited to the application that's been put before the Court which is limited to the plaintiffs' games.

MR. RICCIO: That was the clarification I was seeking. Thank you, your Honor.

THE COURT: That's all we have for today counsel.

THE DEPUTY COURT CLERK: All rise.

(Court concludes at 5:08 p.m.)

ADDENDUM:

Upon further consideration of the question posed by counsel for the NJTHA as to the scope of the temporary restraining order, this court finds that the temporary restraining order restrains the implementing, enforcing, or taking any action pursuant to New Jersey Senate Bill 2460 (P.L. 2015, c. 62), the 2014 Law, and would apply to any lottery, sweepstakes, or [21]

other betting, gambling, or wagering scheme based, directly or indirectly, on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games. The scope of restraints is NOT limited to the games sponsored by the plaintiffs' leagues.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	Civil Action No. 3:14-cv-6450 (MAS)(LHG)
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al., Defendants, STEPHEN M. SWEENEY, et al., Defendants- Intervenors.	Civil Action No. 3:12-cv-4947 (MAS)(LHG) **ORDER**

THIS MATTER having been brought before the Court by McCarter & English, LLP, Skadden, Arps,

Slate, Meagher & Flom LLP, and Bancroft PLLC, attorneys for Plaintiffs National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the Commissioner of Baseball doing business as Major League Baseball (collectively, "Plaintiffs"), seeking a Temporary Restraining Order, and the Court having considered the papers submitted in support of and in opposition to the Application; and the Court having determined that Plaintiffs are entitled to the requested temporary relief; and for other good cause shown.

IT IS this _____ day of October, 2014,

ORDERED that Plaintiffs application for temporary restraints in Case No. 14-6450 is **GRANTED**.

IT IS FURTHER ORDERED THAT Defendants are restrained from sponsoring, operating, advertising, promoting, licensing, or authorizing a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

IT IS FURTHER ORDERED THAT Defendants are restrained from implementing, enforcing, or taking any action pursuant to New Jersey Senate Bill 2460 (P.L. 2015, c. 62).

IT IS FURTHER ORDERED THAT Defendants New Jersey Thoroughbred Horsemen's Association and New Jersey Sports Exposition Authority are restrained from advertising, promoting, or operating sports wagering pursuant to New Jersey Senate Bill 2460 (P.L. 2015, c. 62), or otherwise, and from sponsoring, operating, advertising, promoting, licensing, or authorizing any lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly, on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

IT IS FURTHER ORDERED THAT Defendants New Jersey Thoroughbred Horsemen's Association and New Jersey Sports Exposition Authority are restrained from conducting sports wagering at Monmouth Park.

IT IS FURTHER ORDERED THAT the above restraints shall remain in effect until this Court resolves Plaintiffs' application for a preliminary injunction.

IT IS FURTHER ORDERED THAT Plaintiff's Motion for Order to Show Cause with Temporary Restraints in regards to Case No. 12-4947 is hereby terminated, as Plaintiff has not requested any relief in their application with respect to that case.

October 24, 2014

HON. MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	Civil Action No. 3:14-cv-6450 (MAS)(LHG)
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al., Defendants, STEPHEN M. SWEENEY, et al., Defendants- Intervenors.	Civil Action No. 3:12-cv-4947 (MAS)(LHG) **SCHEDULING ORDER**

IT IS this 27th day of October, 2014,

ORDERED that

(1) Defendants may file additional briefing in opposition to Plaintiffs' pending application for a preliminary injunction by **Monday, November 3, 2014**;

(2) Plaintiffs may file a reply brief by **Friday, November 7, 2014**; and

(3) The Court will hear oral argument on **Thursday, November 20, 2014 at 10:00 a.m.**

IT IS FURTHER ORDERED that the 14-day limitation period on the temporary restraining order is extended, for good cause and by the consent of all parties, for an additional 14 days pursuant to Federal Rule of Civil Procedure 65(b)(2) until November 21, 2014.

IT IS FURTHER ORDERED that the NJTHA's request for an increase in security due to the fourteen day extension is granted, and Plaintiffs must post an additional $1,700,000 bond, making the total bond $3,400,000, by **Monday, November 10, 2014**.

HON. MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*, Plaintiffs, v. CHRISTOPHER J. CHRISTIE, *et al.*, Defendants.	Civil Action No. 3:14-cv-06450 (MAS) Honorable Michael A. Shipp, U.S.D.J. **DECLARATION OF DAVID L. REBUCK IN SUPPORT OF THE STATE DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

I, David L. Rebuck, hereby declare:

1. I am the Director of the Division of Gaming Enforcement ("DGE" or "Division") within the New Jersey Department of Law and Public Safety. I was nominated to the position in 2011 and was confirmed in 2012. DGE enforces the Casino Control Act, N.J. Stat. Ann. § 5:12-1 *et seq.*, and the regulations promulgated thereunder. The Division's oversight of the casino gaming industry includes investigations, inspections, audits, and criminal and regulatory prosecutions, as well as daily monitoring of certain casino operations.

2. As the Director, I am responsible for overseeing all aspects of DOE's enforcement of the Casino Control Act and its accompanying regulations. The Division has primary rulemaking authority over all aspects of casino gambling, save for the issuance of casino licenses. While DOE plays a role in investigating prospective licensees, the Casino Control Commission, an independent agency affiliated with the New Jersey Department of the Treasury, rather than DOE, is empowered to issue casino licenses.

3. Regulation of New Jersey's eight casinos generally occurs under the auspices of the Casino Control Act and the associated regulations set forth in N.J. Admin. Code § 13:69N *et seq.* With respect to the forms of gaming covered by the Casino Control Act, the regulations thereunder govern, among other things:

- Accounting and internal controls, including audits, N.J. Admin. Code § 13:69D *et seq.*;
- Rules of the games, *id.* § 13:69F *et seq.*;
- Inspections of gaming equipment, *id.* § 13:69E *et seq.*;
- Maintaining registries of casino employees and vendors, *id.* §§ 13:69C *et seq.*, 691 *et seq.*;
- Self-exclusion list violations, *id.* § 13:69g *et seq.*; and
- Security and closed-circuit television (CCTV) surveillance, *id.* § 13:69d-1.10.

DOE's Regulatory Responsibilities Under The Repealed 2012 Sports Wagering Law

4. The 2012 Sports Wagering Law ("2012 Law"), which has since been repealed, would have created a detailed regulatory regime for sports wagering akin to the one currently governing other forms of casino gaming, such as poker, blackjack, or the simulcasting of horse racing. The 2012 Law provided that DOE would have had an active role and general responsibility in promulgating, and subsequently administering, regulations specifically applicable to sports wagering at casinos and racetracks. Indeed, shortly after the 2012 Law's enactment, DGE developed and issued

a full set of regulations governing sports wagering. These regulations, set forth at N.J. Admin. Code § 13:69N, subsequently were enjoined by the federal courts and then were repealed by P.L. 2015, c. 62 ("2014 Act").

5. The 2012 Law contained specific provisions governing the actual operation of sports pools. For example, under the 2012 Law and the DGE regulations promulgated thereunder, sports pools would have been restricted to designated "sports lounges" and would have been subject to a number of detailed requirements, including using tested and approved equipment, utilizing the same kind of surveillance and security measures employed in other gaming areas within the casino, and displaying the wagering odds according to prescribed standards. N.J. Stat. Ann. § 5:12A-2(b), (c). Additionally, DGE would have regulated a number of other subject areas, including, among others:

- A sports pool's amount of cash reserves, N.J. Stat. Ann. § 5:12A-4(a); N.J. Admin. Code § 13:69N-2.5;

- Acceptance of wagers on a series of sports events, N.J. Stat. Ann. § 5:12A-4(b);

- Maximum wagers from any one patron on any one event, *id.* § 5:12A-4(c);

- Types of permissible wagering tickets and methods by which they may be issued, *id.* § 5:12A-4(d), (e); N.J. Admin. Code § 13:69N-2.3(b);

- Methods of accounting to be used by operators, N.J. Stat. Ann. § 5:12A-4(f); N.J. Admin. Code § 13:69N-1.11;

- Types of records to be kept, N.J. Stat. Ann. § 5:12A-4(g);

- Patrons' payment methods, *id.* § 5:12A-4(h);

- Types of systems used for wagering, *id.* § 5:12A-4(i); N .J. Admin. Code § 13:69N-1.12;

- Protections for persons placing wagers, *id.* § 5:12A-4(j); N.J. Admin. Code § 13:69N-1.9;

- Display of the 1-800-GAMBLER hotline, N.J. Stat. Ann. § 5:12A-4(k);

- Maintenance of exclusion lists, *id.* § 5:12A-2(e);

- Licensing of casino employees working in sports wagering lounges, *id.* § 5:12A-3(a); and

- Adoption of comprehensive house rules governing sports wagering transactions, covering things such as the amount to be

paid on winning wagers and the effect of schedule changes, *id.* § 5:12A-5.

DGE's Lack Of Any Regulatory Role After The 2014 Act

6. Now that the 2012 Law and any rules and regulations in the Casino Control Act or other parts of the criminal and civil codes that could be construed to "authorize" sports wagering have been repealed by the 2014 Act, neither I nor anyone else at DGE will regulate sports wagering offered by casinos or racetracks. To the extent that sports wagering occurs, it will do so without state regulation by DGE.

7. The 2014 Act is entirely self-executing. No action is required on my part to implement or enforce the 2014 Act for the simple reason that the 2014 Act prohibits DGE from applying any of the Casino Control Act provisions or accompanying regulations to sports wagering. For example, although DGE typically would require an on-premises vendor such as William Hill plc, a sports betting bookmaker, to undergo a background check, submit financial information, and apply for a license, under the 2014 Act, DGE is not permitted to investigate William Hill's credentials or financial statements in relation to that entity's operation of a sports wagering pool, nor would DGE issue any kind of report to the Casino Control Commission as part of any license application. In other words, DGE will have no

role or say in any decision by a casino or racetrack to either internally operate a sports pool or hire a private company like William Hill to operate the casino's or racetrack's sports pool. That is a marked departure from DGE's usual mode of regulating casino vendors, but it is what I understand the 2014 Act requires.

8. Similarly, DGE would not enforce or maintain a voluntary self-exclusion list of persons who are to be prohibited from participating in a sports wagering pool. In other words, gamblers otherwise appearing on the voluntary self-exclusion list (meaning that they may enter a casino, but not participate in any gaming), would not be prohibited by DGE from participating in a sports wagering pool, even though DGE would prohibit them from participating in all other forms of gaming.

9. Surveillance provides yet another example of how sports wagering is treated differently from other forms of wagering. The Casino Control Act calls for very specific surveillance and security measures for gaming areas within a casino, but those surveillance and security measures would not apply to sports lounges or other areas where sports wagering might occur; from DGE's perspective, those areas instead would be treated as if they were part of a restaurant, the hotel lobby, the parking garage, or any other non-gaming area of the casino.

10. Sports wagering operators and patrons will, of course, like any other individual or entity, remain subject to all federal and state criminal laws as well as state regulations, such as the consumer fraud protection rules, that are generally applicable to all businesses, not just casinos and racetracks. Thus, if it became known that a patron of a sports wagering pool, the entity operating the pool, or an employee of the pool were engaged in any kind of criminal activity, such as fraud or theft, whether or not connected to sports wagering, that person or entity could face investigation or prosecution. However, any such investigation or prosecution would be run exclusively by state or local law enforcement authorities, such as the Atlantic City Police Department. DGE would not have any involvement in those proceedings and there would be no sports wagering-specific regulations to inform such an enforcement action.

11. It is my understanding that pursuant to the 2014 Act, no provision of the Casino Control Act or any of its accompanying regulations applies to sports wagering.

12. In sum, after the 2014 Act, none of the subject areas described in paragraphs 3 and 5 that would have been subject to regulation under the 2012 Law, or would have been incidentally regulated by other provisions of the Casino Control Act, to the extent they relate to sports wagering, will fall within the pur-

view of DGE. DGE will not monitor nor concern itself with whether or not a casino elects to operate a sports pool or the way a casino goes about operating such sports pool. For all intents and purposes, DGE now considers sports wagering to be "non-gambling activity" akin to fantasy sports betting or "social gaming" offered by some casinos that is beyond DGE's control and outside of DGE's regulatory authority.

The facts in this document are known to me and I would be able to testify about them. I hereby declare under penalty of perjury under the laws of the State of New Jersey and the laws of the United States that the foregoing information is true and correct, and that I signed this declaration in _____, _____ on the _____ of November, 2014.

_____

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Director, Division of Gaming Enforcement

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*, Plaintiffs, v. CHRISTOPHER J. CHRISTIE, *et al.*, Defendants.	Civil Action No. 3:14-cv-06450 (MAS) Honorable Michael A. Shipp, U.S.D.J. **DECLARATION OF FRANK ZANZUCCKI IN SUPPORT OF THE STATE DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

I, Frank Zanzuccki, hereby declare:

1. I am the Executive Director of the New Jersey Racing Commission ("NJRC" or "Commission"). I have worked for the Commission since 1978 and was appointed Executive Director in 1991. NJRC is responsible for regulating the horse racing industry, which it accomplishes through regular monitoring, investigations, and, if necessary, prosecutions. NJRC has jurisdiction over New Jersey's thoroughbred and standardbred permit-holders and holds the authority to regulate horse racing at the four racetracks in this State.

2. As the Executive Director of the Commission, I am responsible for administering all Commission activities. In addition, I have certain specific responsibilities, including the authority to supervise all race officials, licensees, and employees, as well as the conduct of racing, pari-mutuel operations, and the testing of horses.

Overview of Racetrack Regulation in New Jersey

3. The Commission is a division of the New Jersey Department of Law and Public Safety. Among other activities, NJRC oversees pari-mutuel wagering, supervises pari-mutuel operations at all operating New Jersey racetracks, and grants permits for running the thoroughbred and standardbred race meetings in the State.

4. Pari-mutuel wagering is a common form of betting on horse racing, and involves pooling a group of bets and calculating the odds based on the assumption that the pool will be shared by all winning bets. Pari-mutuel wagering is permitted at the four racetracks currently operating in New Jersey. The Commission also has jurisdiction over the simulcasting of horse racing activities at New Jersey's racetracks, as well as casino simulcasting facilities and the State's five currently-operating off-track wagering facilities.

5. The horse racing industry in New Jersey is governed by the statutory provisions set forth in N.J. Stat. Ann. § 5:5-22 *et seq.*, as well as the administrative rules and regulations promulgated by NJRC and set forth in the New Jersey Administrative Code at Title 13, Chapters 70, 71, 72, 73, 74, 74A and 74B. A number of these statutory provisions relate to the pari-mutuel wagering that may occur at racetracks. These include:

   - The need to have a license to offer pari-mutuel wagering, N.J. Stat. Ann. § 5:5-62;

   - Regulations regarding the size of the wagering pools, *id.* § 5:5-62.1;

   - Regulations regarding the display of the odds, the placement of the horses, and the elapsed time of the race, *id.* § 5:5-63;

- Regulations regarding the types of tickets and ticket machines, *id.*;

- Distribution of payments to winners or in the case of ties, *id.*;

- Percentage of payments racetracks are allowed to keep, and purposes for which those payments may be used (e.g., increasing the size of the purse the track can offer), *id.* § 5:5-64.

6. The Commission administers and enforces these statutory provisions and regulations through investigations, penalties, fines, exclusions, and revocation of licenses, among other methods.

NJRC's Role Under The 2012 Sports Wagering Law

7. NJRC had a fairly limited role in regulating sports wagering under the 2012 Sports Wagering Law ("2012 Law"). NJRC's main responsibilities under the 2012 Law were to give "approval," in conjunction with the Division of Gaming Enforcement ("DGE"), to any vendor or operator seeking to offer sports wagering at a racetrack. N.J. Stat. Ann. § 5:12A-2. Typically, the approval process for a vendor would involve a criminal background check and an investigation of the vendor's financials. NJRC's approval process was to be distinct from the sports wagering license itself, which could only be issued by DGE.

NJRC's Role After The 2014 Act

8. In contrast to NJRC's limited role under the 2012 Law, NJRC has no role at all in sports wagering following the 2014 Sports Wagering Act ("2014 Act"). Because the 2014 Act is self-executing, neither I nor anyone else at NJRC will play any part in implementing, enforcing or otherwise effectuating the 2014 Act. To the contrary, we will have no involvement at all in any of the sports wagering operations that may occur at any of the four racetracks in New Jersey. Thus, whereas under the 2012 Law, the Commission might have enforced regulations generally applicable to racetrack vendors—such as the vendor licensing requirements—against sports wagering operators, the Commission will no longer do so following the 2014 Act.

9. Of course, federal and state criminal and civil laws applicable to businesses generally (including but not limited to racetracks and casinos) will continue to apply to all conduct at New Jersey's racetracks, whether or not related to sports wagering. But NJRC will have no direct role in enforcing those laws or prosecuting any violations of those laws.

10. In sum, NJRC will be completely "hands-off" with respect to any sports wagering that may or may not occur at one of the four racetracks subject to its regulatory authority. Following the 2014 Act, sports wagering will be subject to none of the laws or regulations governing,

for example, pari-mutuel wagering or simulcasting, and vendors seeking to offer sports wagering will be exempt from the requirements that apply to other vendors, including those selling food or beverages.

The facts in this document are known to me and I would be able to testify about them. I hereby declare under penalty of perjury under the laws of the State of New Jersey and the laws of the United States that the foregoing information is true and correct, and that I signed this declaration in _____, _____ on the _____ of November, 2014.

Frank Zanzuccki
Executive Director, New Jersey Racing Commission

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*, Plaintiffs, v. CHRISTOPHER J. CHRISTIE, *et al.*, Defendants.	Civil Action No. 3:14-cv-06450 (MAS) Honorable Michael A. Shipp, U.S.D.J. **DECLARATION OF MATTHEW B. LEVINSON IN SUPPORT OF THE STATE DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

I, Matthew B. Levinson, hereby declare:

1. I am the Chairman and Chief Executive Officer of the Casino Control Commission ("Commission" or "CCC") and have held this position since August 2012. The Commission is authorized to interpret and implement the Casino Control Act, N.J. Stat. Ann. § 5:12-1 *et seq.*; it is an independent agency in but not of the New Jersey Department of the Treasury.

2. The Commission is comprised of three members appointed by the Governor. It is charged with licensing New Jersey casinos as well as casino key employees. N.J. Stat. Ann. § 5:12-63. The "key employee" designation applies to those individuals employed in a supervisory capacity in the operation of a casino who are authorized to make various types of discretionary decisions. N.J. Stat. Ann. § 5: 12-9. The Commission also issues findings as to whether certain corporate officers and directors, e.g., CEOs and CFOs of casino holding companies, qualify under the key employee license standards. N.J. Stat. Ann. § 5:12-85.1, -89. The licensing and registration of other casino employees, service industries and vendors falls within the jurisdiction of the Division of Gaming Enforcement ("DGE") within the New Jersey Department of Law and Public Safety.

3. The Commission works closely with DGE in order to fulfill its licensing duties. DGE con-

ducts the background investigation of applicants for casino licenses and casino key employee licenses, and issues recommendations to the Commission regarding whether the applicant meets statutory licensing criteria. N.J. Stat. Ann. §§ 5: 12-80-89, -94. A final determination is issued by the Commission at a public hearing.

4. In addition to its licensing role, the Commission also has a quasi-judicial function, in which it hears appeals of decisions or penalties imposed by DGE. N.J. Stat. Ann. § 5: 12-63(1)(b); N.J. Admin. Code § 19:42A.

5. The Commission conducts periodic, comprehensive reviews of casinos' organizational structures to ensure that casino key employees are correctly identified and appropriately licensed, but has no regulatory oversight over gaming operations. It is authorized to promulgate regulations regarding matters within its jurisdiction. N.J. Stat. Ann. § 5:12-69a.

6. DGE was vested with the general responsibility for administering the 2012 Sports Wagering Law ("2012 Law"). Only a casino licensed by the Commission or a racetrack licensed by the New Jersey Racing Commission would have been eligible for a sports pool license. N.J. Admin. Code § 12:69N-1.2(a) (Repealed). The Commission would otherwise have been involved in the regulation of sports wagering only to the extent it was authorized to issue casino key employee licenses to individuals

deemed, upon review by the Commission, to be "directly involved in sports pool wagering." N.J. Admin. Code § 13:69N-1.8 (Repealed).

7. After the 2014 Sports Wagering Act ("2014 Act"), however, the CCC will not be involved in any review or licensing of sports pool wagering employees. Individuals will not be designated as key employees based upon their direct or indirect involvement in sports wagering pools, and their credentials will not be reviewed or otherwise examined by the Commission for this purpose.

8. Subsequent to the 2014 Act, no statutory or regulatory provision requires licensure or oversight by the Commission of operators or employees of sports pools. The 2014 Act leaves the Commission with no mandate or regulatory authority with respect to sports wagering.

The facts in this document are known to me and I would be able to testify about them. I hereby declare under penalty of perjury under the laws of the State of New Jersey and the laws of the United States that the foregoing information is true and correct, and that I signed this declaration in _____, _____ on the ____ of November, 2014.

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Matthew B. Levinson
Chairman and Chief Executive Officer
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corporated association doing business as Major League Baseball,	:
Plaintiffs	:
v.	:
CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission, NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC., and NEW JERSEY SPORTS AND EXPOSITION AUTHORITY,	:
Defendants,	:
And	:

STEPHEN M. SWEENEY, President of the New Jersey Senate, and VINCENT PRIETO, Speaker of the New Jersey General Assembly,	:	
Defendant-Intervenors.	:	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, NATIONAL BASKETBALL ASSOCIATION, a joint venture, NATIONAL FOOTBALL LEAGUE, an unincorporated association, NATIONAL HOCKEY LEAGUE, an unincorporated association, and OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball,	:	Civil Action No. 3:12-cv-4947 (MAS) (LHG) Hon. Michael A. Shipp, U.S.D.J.
Plaintiffs,	:	
v.		
CHRISTOPHER J. CHRISTIE, Governor of	:	

the State of New Jersey, DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission,	:
Defendants,	:
And	:
STEPHEN M. SWEENEY, President of the New Jersey Senate, SHEILA Y. OLIVER, Speaker of the New Jersey General Assembly, and NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,	:
Defendant-Intervenors.	:

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Preliminary Statement

This application for a preliminary injunction is necessitated by defendants' unrelenting efforts, begun more than three years ago, to devise a way to authorize Atlantic City casinos and New Jersey horse racetracks to conduct sports wagering operations and to sponsor and promote that sports wagering in the hope of attracting business to that part of New Jersey's economy. When legislation expressly authorizing casinos and racetracks to operate sports betting pools was struck down as a violation of the Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701, *et seq.* ("PASPA"), the State cobbled together several attempts to circumvent PASPA and to achieve the same result—enabling sports gambling at these state-licensed gambling venues.

The challenged Senate Bill 2460 (the "2014 Sports Wagering Law") is the most recent effort by the State to disregard federal law—and this Court's prior injunction—and, in the words of New Jersey Assemblyman Ralph Caputo, one of the law's sponsors, to "implement well-regulated sports gaming and even the playing field with other states." (Dreyer Supp. Decl. Ex. 1.) As defendant Governor Christie acknowledged in his August 1, 2014 veto message with respect to Senate Bill 2250, the 2014 Sports Wagering Law's predecessor—which, like the 2014 Sports Wagering Law, purported to "repeal" all of New Jersey's prohibitions on sports wagering, but only at state-licensed casinos and racetracks:

> In a novel attempt to circumvent the Third Circuit's ruling, this bill states that all prohibitions against wagering on the results of any professional, college, or amateur sport or athletic event, set forth in State law would no longer apply to wagering at casinos or racetracks in this State. In essence, this bill partially deregulates betting at casinos and racetracks in an effort to sidestep federal law. While I support the intentions of the Legislature to continue our shared commitment to enhancing the economic vitality of our gaming industry, I cannot sign this bill, which was introduced on the same day the Supreme Court declined to hear our appeal, and then was rushed to final passage just three days later. Ignoring federal law, rather than working to reform federal standards, is counter to our democratic traditions and inconsistent with the Constitutional values I have sworn to defend and protect.

(Dreyer Supp. Decl. Ex. 2.)

Defendants' repeated argument that the 2014 Sports Wagering Law "partially repeals" the prohibitions on sports gambling is nonsense. True enough, the new law repeals the already invalidated 2012 Sports Wagering Law, N.J. Stat. Ann. § 5:12A-1, *et seq.* (West 2012), and the regulations promulgated thereunder. But the new law manifestly does not repeal any of the State's criminal or civil statutes prohibiting gambling generally or sports gambling in particular. All of New Jersey's criminal and civil gambling prohibitions and gaming regulations, including

the detailed Casino Control Act, remain in full force. The 2014 Sports Wagering Law simply carves out a limited exception from those laws for New Jersey's casinos and racetracks. By leaving in place all prohibitions on sports wagering in the State and enacting a limited exception for highly regulated, state-licensed gambling venues, the 2014 Sports Wagering Law plainly confers the State's imprimatur on sports wagering in those gaming locations, authorizing that sports wagering under the auspices of a state-issued license in violation of PASPA. This latest circumvention of federal law should not be countenanced, and plaintiffs' motion for a preliminary injunction should be granted.

Argument

Defendants have not overcome plaintiffs' showing that a preliminary injunction is warranted in this case to maintain the *status quo* pending this Court's ultimate determination that the 2014 Sports Wagering Law should be struck down as yet another violation of PASPA. Plaintiffs have shown a likelihood of success on the merits of their claim because New Jersey has not repealed its prohibitions on sports wagering; it has merely enacted a limited exception authorizing sports wagering at casinos in Atlantic City and at racetracks throughout the State. Moreover, the evidence adduced to date shows that, defendants' denials notwithstanding, defendant the New Jersey Sports and Exposition Authority (the "NJSEA") has expressly authorized defendant the New Jersey Thoroughbred Horsemen's Association (the "NJTHA") to engage in sports gambling at Monmouth Park and

has, in writing, explicitly sponsored that activity. Finally, defendants have not overcome plaintiffs' demonstration that defendants' violation of PASPA would cause irreparable harm to plaintiffs, that the public interest favors the issuance of a preliminary injunction in this case, and that the balance of hardships tips decidedly in plaintiffs' favor on this motion.[1]

I. New Jersey Has Not Repealed Its Prohibitions On Sports Wagering, But Has Merely Enacted A Limited Exception Authorizing Sports Betting At Casinos And Racetracks

The entire foundation for defendants' opposition to this motion—and to the merits of this case—is the assertion that the State has "partially repealed" its prohibitions on sports gambling. But the State has done no such thing. Every one of New Jersey's criminal and civil prohibitions on sports gambling remains in place and in effect today. Nothing has been repealed except the unlawful 2012 Sports Wagering Law and the regulations promulgated thereunder, which this Court and the Third Circuit already declared to be preempted by PASPA. In enacting the 2014 Sports Wagering Law, New Jersey has merely created an express, limited exception to the State's prohibitions which the State has confined to casinos

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[1] This brief responds to defendants' recent briefs in opposition to the motion for preliminary injunction. Plaintiffs do not repeat here, but incorporate by reference, all the arguments set forth in their briefs in support of their motion for a temporary restraining order and preliminary injunction, which were filed on October 21, 2014 (Dkt. 12-2) and October 23, 2014 (Dkt. 26).

and racetracks—venues where the State has already authorized and licensed gambling to be operated, sponsored, promoted and advertised. In other words, New Jersey has enacted a law that supplies state-licensed gambling venues—and those venues alone—with a special right to engage in activity that remains prohibited to all others.[2]

That makes the 2014 Sports Wagering law fundamentally different from the analogies defendants attempt to draw. No one perceives patrons engaged in "conversation" at a licensed barber shop as conversing under the auspices of a state law because New Jersey law does not prohibit "conversation" elsewhere. (State Def. Opp. Br. at 17.) The same cannot be said of sports gambling, however, because, but for the 2014 Sports

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[2] The Legislators' argument that the one former racetrack in New Jersey—the former Garden State Park racetrack in Cherry Hill—is no longer subject to any racetrack or casino regulations (Legislators Opp. Br. at 16-17) is deliberately misleading. In fact, to show that the inclusion of the former racetrack as a venue at which sports gambling is authorized by the 2014 Sports Wagering Law was not "a ruse," the Legislators acknowledge that the former Garden State Park racetrack was previously included in legislation authorizing the establishment of off-track betting establishments. (*Id.* at 17.) Coupled with the Legislators' express confirmation that the intent of the 2014 Sports Wagering Law was to permit sports wagering only in "certain locations where other gambling is already allowed," (*id.* at 10), it is obvious that the sponsors of the 2014 Sports Wagering Law contemplated that sports wagering would be conducted at the former Garden State Park only in conjunction with off-track betting, which is, of course, subject to its own detailed licensing and regulatory regime. *See* N.J. Stat. Ann. §§ 5:5-127 to 160 (Off-Track and Account Wagering Act) (West 2012).

Wagering Law, there is no question that sports gambling at casinos or racetracks (like at all other venues) would be prohibited. Accordingly, this is not a situation in which the "right" of those state-licensed gambling venues to add sports gambling to their offerings derives from the inherent "right to do that which is not prohibited" by law. *Nat'l Collegiate Athletic Ass'n v. Christie*, 730 F.3d 208, 232 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014) ("*Christie I*"). It instead derives expressly and directly "from the authority of the state," *id.*, in the form of the special exemption that the 2014 Sports Wagering Law provides. New Jersey's attempted workaround thus does not change the obvious reality that the State has achieved precisely what PASPA prohibits: "sports gambling activity ... under the auspices of state approval and authorization." *Id.*

Defendants attempt to avoid that conclusion by claiming that, under the new law's exception for casinos and racetracks, all regulation of sports gambling in those state-licensed gambling venues has been eliminated. But that, too, is untrue. Even at casinos and racetracks, the 2014 Sports Wagering Law continues to prohibit sports wagering by persons under twenty-one years old, sports wagering on collegiate and other amateur athletic contests occurring within New Jersey, and sports betting on collegiate athletic events involving New Jersey colleges and universities, regardless of where they occur. And casinos and racetracks continue to be subject to extensive regulation to ensure that approved gaming is fairly and honestly conducted by persons whose financial and criminal backgrounds have been fully vetted by the appropriate authorities. For instance, the State defendants

readily acknowledge that they fully intend to ensure that any sports gambling offered in New Jersey complies with consumer protection laws. (*See* State Def. Opp. Br. at 4-5.) That is hardly the kind of "complete deregulation" of sports gambling that the Third Circuit has held PASPA leaves open to states. *Christie I*, 730 F.3d at 235.

Indeed, the legislative sponsors of the 2014 Sports Wagering Law have openly trumpeted the fact that the law ensures state control over the manner in which sports gambling will occur. As Assemblyman Caputo explained: "All New Jersey is trying to do is legally *implement well-regulated sports gaming* and even the playing field with other states. It's time for the courts to get out of the way and allow New Jersey to decide its own gaming laws." (Dreyer Supp. Decl. Ex. 1 (emphasis added).) Defendants emphasize in their opposition papers that this Court should look to the legislative intent when construing the challenged statute (*see, e.g.*, Legislators Opp. Br. at 10-14), and that legislative intent makes clear beyond dispute that the intention of the Legislators when enacting the 2014 Sports Wagering Law was to authorize and promote well-regulated sports gaming at casinos in Atlantic City and racetracks throughout the State.[3] Implicitly recognizing that the 2014 Sports Wagering

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[3] Because the 2014 Sports Wagering Law does in fact authorize sports gambling under the auspices of a state license, defendants' Eleventh Amendment and standing arguments necessarily fail, as those arguments are entirely derivative of defendants' flawed contention that the law "imposes no imprimatur" on sports gambling. (State Def. Opp. Br. at 23.)

Law cannot seriously be understood as a "complete deregulation" of sports gambling in New Jersey, defendants fight the premise that "PASPA gives states the choice of either implementing a ban on sports gambling or of accepting complete deregulation of that field." *Christie I*, 730 F.3d at 235. Invoking carefully selected snippets of the Third Circuit's opinion, they instead insist that PASPA leaves states with "much room" to determine "what the exact contours of the prohibition ... will be." (*See, e.g.*, State Def. Opp. Br. at 13.) Defendants completely distort what the Court actually said, which is that PASPA gives states two—and only two—options:

> Neither of PASPA's two "choices" affirmatively requires the states to enact a law, and both choices leave much room for the states to make their own policy. Thus, under PASPA, on the one hand, a state may repeal its sports wagering ban, a move that will result in the expenditure of no resources or effort by any official. On the other hand, a state may choose to keep a *complete ban* on sports gambling, but it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be.

Christie I, 730 F.3d at 233 (emphasis added).

As is clear in context, when the Court referred to how "much room" states retain to determine "the exact contours of the prohibition," it was referring to

things like the kinds of penalties and consequences that accompany a "complete ban," not the persons or venues to which that ban applies.[4] Indeed, the Court never even hinted at the notion that a state may prohibit sports gambling in some but not all venues, or to some but not all people, while still managing to avoid having "authorized" or "licensed" it—let alone that a state might achieve that oxymoronic result by prohibiting sports gambling everywhere except in venues at which gambling already occurs under the auspices of a state license.

That makes defendants' attempt to resurrect their commandeering argument a nonstarter. PASPA avoids a commandeering problem by offering states the option of having "*no law* in place governing sports wagering," *id.* at 232, not the option of achieving "well-regulated sports gaming" through authorization styled as a "partial repeal." To be sure, as the Third Circuit recognized, the choice between a complete ban and a complete repeal might be a difficult one. "But the fact that Congress gave the states a hard or tempting choice does not mean that they were given no choice at all, or that the choices are otherwise unconstitutional." *Id.* (citations omitted). Nor does the fact that New Jersey apparently is unwilling to exercise either of the options Congress has given it empower the State to settle on some novel half-measure in an

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[4] So, too, was the United States when it observed in its brief in opposition to defendants' unsuccessful petitions for certiorari that, under PASPA, "New Jersey is free to repeal [its sports gambling] prohibitions in whole or in part." (DOJ Opp. to Cert. at 11.) That New Jersey may alter or repeal aspects of its scheme for enforcing its prohibition does not mean that New Jersey may "partially repeal" the prohibition itself.

open and acknowledged effort to use sports gambling to boost the revenues of state-licensed gambling venues (not to mention the State itself). As defendants repeatedly quote plaintiffs' counsel as saying, PASPA allows states to remain wholly "indifferent as to whether private individuals are gambling on sports," which is decidedly not what New Jersey has done here.

Finally, defendants urge this Court not to decide whether the state constitution requires all gambling conducted in New Jersey casinos and racetracks to be "authorized by law" and whether, if the 2014 Sports Wagering Law does not authorize sports wagering, then it violates the state constitution. But defendants do not dispute that this Court has jurisdiction to decide those constitutional law questions. And the Court would act well within its discretion in doing so here, where the meaning of the phrase "authorize by law" for purposes of construing PASPA is inextricably intertwined with the meaning of that phrase as used in the New Jersey Constitution.

In sum, regardless of what defendants call it, the 2014 Sports Wagering Law does not repeal any of New Jersey's prohibitions on sports wagering. It simply creates a partial exception to those prohibitions to authorize persons over the age of twenty-one to engage in sports wagering on sporting events other than those involving New Jersey colleges and universities or other amateur contests within the State, and only at heavily regulated, state-licensed gambling venues. The law grants the State's imprimatur to sports wagering in those gaming venues and provides that sports gambling with "a label of legitimacy that

would make the activity appealing." *Id.* at 237. This is precisely what PASPA prohibits. Accordingly, plaintiffs have shown a likelihood of success of the merits of their challenge to the 2014 Sports Wagering Law, and the issuance of a preliminary injunction maintaining the *status quo* should be granted.

Indeed, now that all the briefing regarding preliminary relief has been completed, it is clear that this Court's ultimate determination of the 2014 Sports Wagering Law's legality under PASPA turns on the Court's construction of the law on its face, and does not depend on any facts outside the complaint. Accordingly, this Court currently has all of the information it needs to render summary judgment in plaintiffs' favor. As the Third Circuit wrote when it reversed the denial of a preliminary injunction and, *sua sponte*, entered summary judgment against the State of Delaware for violating PASPA with its own sports gambling authorization: "When a party seeks injunctive relief, the stakes are high, time is of the essence, and a straightforward legal question is properly presented to us, prudence dictates that we answer that question with dispatch." *Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293, 297 (3d Cir. 2009).

II. The NJSEA Has Expressly Authorized The NJTHA To Engage In Sports Gambling At Monmouth Park And Has Explicitly Sponsored That Activity

Regardless of the legality of the 2014 Sports Wagering Law under PASPA, there are no circumstances under which sports gambling may lawfully occur at Monmouth Park because the park is owned by

the State and operated pursuant to a compact with the NJSEA, a State agency. PASPA also makes it unlawful for: (i) a governmental entity such as the NJSEA to sponsor, operate, or "authorize by ... compact" sports gambling; and (ii) an entity such as the NJTHA—to "sponsor, operate, advertise, or promote" sports gambling "pursuant to ... compact of a governmental entity." 28 U.S.C. §§ 3702(1), (2). Although the NJSEA represented to the Court that it is merely a "hands-off" landlord whose lease with the NJTHA "[a]s to gaming . . . provides only that illegal activities are not permissible" (NJSEA Opp. to TRO, at 1), these claims are flatly contradicted by the lease itself. In fact, pursuant to the lease, a copy of which the NJSEA provided in opposition to this motion, (i) the NJSEA has already *expressly authorized* sports gambling at Monmouth Park; (ii) the parties to the lease have expressly agreed that NJTHA's activities at Monmouth Park are "deemed to be *sponsored*" by NJSEA; and (iii) the NJSEA is a market participant in sports wagering in that it would receive an increased rent based in part on sports betting revenue.

A. The NJSEA Has Authorized Sports Wagering At Monmouth Park

Sections 7.01 and 7.02 of the lease unequivocally provide that, for the duration of the lease term, to the extent permissible under state and federal law, the NJTHA "shall be entitled to use the Premises" for "sports betting" "[u]pon the enactment and effectiveness" of any New Jersey law that permits sports betting at the racetrack. (*See* Marra Decl. Ex. A (Dkt. 43-2), §§ 7.01, 7.02.) These provisions of Article VII are by themselves sufficient to establish a violation of

PASPA, since they authorize sports gambling at Monmouth Park by compact.[5]

The NJSEA's effort to avoid the plain language of the lease by arguing that its authorization of the NJTHA to conduct sports wagering under Article VII will not be "triggered" until the 2014 Sports Wagering Law is determined not to violate federal law (NJSEA Opp. Br. at 11) is unavailing. The NJSEA is a governmental entity that, under PASPA, may not authorize the NJTHA to conduct sports gambling at the state-owned Monmouth Park, period. That is so whether or not the 2014 Sports Wagering Law violates PASPA. Indeed, even if New Jersey were to completely deregulate sports gambling throughout the State, the NJSEA still could not authorize the NJTHA to operate sports wagering at the state-owned Monmouth Park (or at the state-owned Meadowlands racetrack, for that matter).

The NJSEA's further assertion that authorization under the lease requires additional action on the part of the NJSEA to be effective, and that the 2014 Sports Wagering Law deprives the NJSEA, as the property owner, of the ability to "allow or prohibit" sports wagering on the property and "void[s]" all provisions of the lease "that call for action by the Authority to allow sports wagering" on the property (*id.* at 10) is nonsense. Article VII of the lease makes it clear that the NJSEA has already authorized the NJTHA

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[5] A "compact" is merely "[a]n agreement or covenant between two or more parties." *See* Black's Law Dictionary 318 (9th ed. 2009).

to operate sports wagering if such wagering is permitted in New Jersey, and no further approval or other act on the part of the NJSEA is required to effectuate that authorization. Moreover, nothing in the 2014 Sports Wagering Law even purports to abrogate contractual provisions in the State's lease with the NJTHA. And the notion that the State of New Jersey has prevented itself, by statute, from deciding what may lawfully occur on its own property is preposterous. In any event, if the 2014 Sports Wagering Law really did force the NJSEA to tolerate the operation of sports gambling even on state-owned property, then that would simply reaffirm that the law itself authorizes state-sponsored gambling.

In short, New Jersey owns the property that it has leased to the NJTHA, and, as the owner of that property, it manifestly has the right to authorize what is done on that property. And, in violation of PASPA, it has authorized the NJTHA to operate sports gambling on that property. That violation should be enjoined.

B. The NJSEA Has Sponsored Sports Wagering At Monmouth Park

The lease between the NJSEA and the NJTHA further provides that the NJTHA's use and operation of Monmouth Park "shall be deemed to be sponsored" by the NJSEA. Specifically, the lease states:

> Authority Sponsorship. The Authority and Tenant acknowledge and agree that this Agreement constitutes a project of

> the Authority under the Enabling Legislation and Tenant's use and operation of the Premises for Racing Events, is in furtherance of and substantially related to the Authority's interests and responsibilities under, and the specific legislative purpose of, the Enabling Legislation and as such, ***Tenant's use and operation thereof shall be deemed to be sponsored by the Authority***.

(Marra Decl. Ex. A, § 33.06) (emphasis added).

The provision is consistent with the NJSEA's function as "an economic engine for the State of New Jersey by providing facilities and support" to sports and entertainment interests. (NJSEA Opp. Br. at 2.) Under the foregoing provision, the NJTHA's use and operation of the leased premises for sports wagering, if not enjoined, would be sponsored by the NJSEA, in violation of PASPA. The 2014 Sports Wagering Law does not in any way purport to abrogate this provision of the lease.

C. The NJSEA Would Derive Additional Revenues Tied To Sports Gambling

Finally, the lease makes clear that the NJSEA would derive revenue directly from the NJTHA's sports gambling activities, and thus be a participant in the sports wagering market. Under Article VII, if sports gambling were conducted at Monmouth Park, the NJSEA would receive a rent increase, based in

to operate sports wagering if such wagering is permitted in New Jersey, and no further approval or other act on the part of the NJSEA is required to effectuate that authorization. Moreover, nothing in the 2014 Sports Wagering Law even purports to abrogate contractual provisions in the State's lease with the NJTHA. And the notion that the State of New Jersey has prevented itself, by statute, from deciding what may lawfully occur on its own property is preposterous. In any event, if the 2014 Sports Wagering Law really did force the NJSEA to tolerate the operation of sports gambling even on state-owned property, then that would simply reaffirm that the law itself authorizes state-sponsored gambling.

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part on "the existing market value of the [sports gambling] right" and "operating expenses" related to the sports gambling activity. (Marra Decl. Ex. A, § 7.02.) In addition, the lease provides that, beginning in 2017, the NJTHA's rent will be determined as a percentage of its "Net Operating Profits" (*id.* § 2.03(a)(ii)), which will be based on gross revenues (*id.* § 1.01), including sports gambling revenues if that activity is not enjoined.

* * * *

In light of the foregoing, the NJSEA's protestations that it is merely a passive landlord that has no ability to control what its tenant does on the State's property and has not authorized or sponsored the NJTHA to engage in sports wagering at Monmouth Park are simply false. As a governmental entity, the NJSEA may not, under any circumstances, sponsor, operate, advertise, promote, license or authorize by compact sports wagering on state-owned property, including Monmouth Park. And the NJTHA may not engage in sports wagering at Monmouth Park pursuant to a compact with the NJSEA. The lease agreement between the NJSEA and the NJTHA expressly authorizes and sponsors sports wagering at Monmouth Park, and confers on that sports wagering the very state imprimatur that PASPA renders unlawful. That clear violation of PASPA should be enjoined.

III. This Court Has Already Found That Defendants' Unlawful Conduct, If Not Preliminarily Enjoined, Would Cause Plaintiffs Irreparable Harm

This Court has already held in *Christie I* that plaintiffs would be irreparably harmed if New Jersey's casinos and racetracks were permitted to offer sports gambling. And defendants recognize that harm. As this Court has noted, the 2014 Sports Wagering Law expressly "carves out a prohibition on sports wagering on collegiate athletic contests occurring in the state or involving New Jersey colleges," a provision of the law that "belies any argument that plaintiffs are not injured by gambling on their games." (TRO Order, at 15.) There simply is no basis to relitigate the issue of irreparable injury.

Nonetheless, in their opposition papers, defendants make three collateral attacks on the *Christie I* decision. Each of these attacks fails.

First, defendants erroneously suggest that this Court based its prior findings of irreparable harm solely on the violation of PASPA. (NJTHA Opp. Br., at 26-27.) But, as plaintiffs have demonstrated, the damage to plaintiffs that would result from the 2014 Sports Wagering Law is irreparable, irrespective of whether PASPA is violated. (*See, e.g.*, TRO Order, at 12-15 (noting the harms caused by associating plaintiffs' games with gambling); Pls. TRO Reply, at 11-13; *see also* TRO Order, at 14 ("This assertion of reputational harm is a very real harm that would be a direct result of sports wagering on plaintiffs' games caused by defendants."); *Christie I*, No. 12-4947 (MAS) (LHG), 2012 WL 6698684, at *6 (D.N.J. Dec. 21, 2012) (citing studies that demonstrate irreparable harm to plaintiffs when sports are associated with or "in close geographic proximity to legalized gambling"); Pls.

56.1 Response (Dkt. 95-2), at 36-37, 58-63, 63-72 (discussing numerous harms identified during discovery).) In any event, PASPA is violated here, so defendants' argument is unavailing.

Second, defendants rely on the thirty-seven-year-old decision in *NFL v. Governor of Delaware*, 435 F. Supp. 1372 (D. Del. 1977), to argue that there can be no irreparable harm from sports gambling. (NJTHA Opp. Br. at 26; State Def. Opp. Br. at 25.) This case long predates the more recent and relevant decision in *Christie I*, as well as the congressional findings that led to the passage of PASPA fifteen years after the *NFL* case was decided. *See generally* S. Rep. No. 102-248 (1991).

And third, defendants challenge as "schizophrenic" plaintiffs' position that any repeal of the State's prohibition on sports wagering must be a complete deregulation, arguing that it is somehow irrational for plaintiffs to insist that defendants comply with PASPA's mandate that New Jersey choose between a complete ban and complete deregulation of sports betting within the State. (NJTHA Opp. Br. at 28; State Def. Opp. Br. at 25-26.) Defendants suggest that plaintiffs should prefer the limited containment of sports gambling in heavily regulated, state-licensed casinos and racetracks, rather than the decriminalization and complete deregulation of sports wagering everywhere within the State. (State Def. Opp. Br. at 25-26.) Relatedly, the NJTHA asserts that plaintiffs have "unclean hands" because they seek to enforce the proscriptions of PASPA while, for example, permitting their games to be played in jurisdictions that permit

sports gambling. (NJTHA Opp. Br. at 30.) These assertions conflate the issue of harm with the question of whether conduct is actionable under PASPA. The relevant provision of PASPA permits plaintiffs to challenge only sports wagering that has been sponsored, operated, advertised, promoted, licensed or authorized by law or compact by a governmental entity. Plaintiffs are not precluded from seeking to enjoin actionable conduct threatening them with irreparable injury here simply because other non-actionable conduct may also threaten plaintiffs with such injury.

In sum, defendants have not provided any basis whatsoever for this Court to reexamine the decision in *Christie I* with respect to the irreparable injury with which plaintiffs are threatened by defendants' unlawful conduct, or to come to a different conclusion about the existence of that irreparable injury.

IV. The Public Interest And The Balance Of Harms Favor The Issuance Of A Preliminary Injunction

Defendants contend that the harms to plaintiffs are outweighed by the purported economic benefits of legalized sports gambling in New Jersey, the monetary harms the NJTHA will suffer if unable to conduct sports betting, and the need of the State to enact laws as it sees fit. These same arguments were raised by these same parties in *Christie I* in opposing summary judgment and a permanent injunction. (*See, e.g.*, State Def. Sum. J. Opp. (Dkt. 76-1, at 39) (arguing that a permanent injunction would deprive the State of needed economic stimulus); NJTHA Rule 56.1 Stmt., ¶¶ 29-34 (Dkt 72-4) (arguing that sports wagering was

essential to the economic vitality of Monmouth Park and the horseracing industry); Legislators Sum. J. Opp. at 1-2, 14-15 (Dkt. 139) (arguing that enforcing PASPA would "expressly prohibit the Legislature from implementing its collective legislative judgment").)

For the same reasons these arguments were rejected in *Christie I*, they should be rejected here. As the Court correctly found in *Christie I*, there is no hardship at all in requiring defendants to comply with federal law, and "[t]he public interest is favored by protecting valid federal statutes from being infringed upon and upholding the mandates of the [Supremacy Clause]." *Christie I*, 926 F. Supp. 2d 551, 578 (D.N.J. 2013) (citing *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003)).[6]

V. The 2014 Sports Wagering Law Should Be Enjoined In Its Entirety

The NJTHA suggests that, if this Court determines that the 2014 Sports Wagering Law violates PASPA, injunctive relief should be directed towards wagering only on plaintiffs' games, and not on the sporting events of other sports leagues and associations. This suggestion ignores the legal principle that, if a state law violates the Supremacy Clause of the

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[6] The public interest is similarly favored by protecting the New Jersey Constitution from violation by the 2014 Sports Wagering Law. *See Garden State Equality v. Dow*, 79 A.3d 479, 488 (N.J. Super. Ct. Law Div. 2013) (recognizing no public interest in a state's ability to enforce an unconstitutional law).

United States Constitution, federal courts may invalidate the state law in its entirety. *See Christie I*, 730 F.3d at 226 (noting that PASPA's preemption language operates "to invalidate state laws that are contrary to the federal statute"); *see also New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 241 (3d Cir. 2002); *Ass'n for Fairness in Bus. v. New Jersey*, 82 F. Supp. 2d 353, 364 (D.N.J. 2000) (enjoining the enforcement of certain provisions of the Casino Control Act). Because there is no plausible basis on which the 2014 Sports Wagering Law could be deemed compliant with PASPA as to gambling on some, but not all, sporting events, the conclusion that the law is invalid in its entirety necessarily flows from the conclusion that it is invalid as to plaintiffs' games.

To the extent that the NJTHA relies on standing cases to support its request that the preliminary injunction bar gambling only on plaintiffs' games, that reliance reveals that the NJTHA has confused plaintiffs' right to bring a claim under PASPA with the remedy available to plaintiffs for a violation of PASPA. Although standing to challenge a violation of PASPA requires that plaintiffs' games be "the basis of such violation," PASPA provides that, as a remedy, plaintiffs may seek "to enjoin a violation of section 3702." 28 U.S.C. § 3703. Accordingly, given plaintiffs' likelihood of success in proving that the 2014 Sports Wagering Law violates PASPA, the Court may enjoin that violation of PASPA and prevent the NJTHA from offering gambling on all sports events, not just those of the five plaintiffs and their members.

VI. The Bond Amount Proposed By The NJTHA Is Speculative And Excessive

The NJTHA's baseless request that plaintiffs be ordered to post a bond exceeding $24 million to secure Monmouth Park's purported "lost profits" during the pendency of this litigation (NJTHA Opp. Br. at 38) should be rejected. That amount—based on Monmouth Park advisor Dennis A. Drazin's speculative conclusion that the racetrack would lose weekly profits of $1,170,219 (over $60 million in a year) if it were enjoined from operating a sports pool (*see* NJTHA TRO Opp. Br. at 36)—vastly exceeds any reasonable expectation of the profitability of Monmouth Park's sports betting operations.

Publicly available gambling data—including the same data that Mr. Drazin utilized—provide several reasons to conclude that Mr. Drazin's potential lost profit calculation is unsupported and should not be credited. First, Mr. Drazin predicates his calculation on the assumption that New Jersey has a "mature" sports betting market, which it currently does not. Second, Mr. Drazin's calculation assumes that a "mature" New Jersey sports betting market would be three times *larger* than Nevada's sports betting market. But, using a comparison of the mature New Jersey and Nevada casino wagering markets (excluding sports), the data show that, in 2013, such casino revenue in the Nevada market (approximately $10.9 billion) was four times larger than in the New Jersey market (approximately $2.8 billion), and that, conversely, the New Jersey market is only 26% the size of the Nevada market. (Dreyer Supp. Decl. ¶¶ 9-14.) There is no basis to assume that the relative size of sports betting markets in New Jersey and Nevada would differ in any meaningful way from the relative size of non-sports gambling markets in those two

states. Third, Mr. Drazin assumes that Monmouth Park would capture 10% of the New Jersey sports betting market, although he offers no basis for that assumption. And fourth, despite the fact that Monmouth Park's hotel and entertainment infrastructure and operations are minuscule compared to the hotel and entertainment infrastructure and operations in Nevada, Mr. Drazin predicts that Monmouth Park's *weekly* sports betting profits of $1.1 million would exceed the *annual* 2013 sports betting revenues of the average Nevada sports betting location, which collected $1.09 million in sports betting revenues for all of 2013, and would equal what the most lucrative Nevada gambling properties—those on the Las Vegas Strip, which collected approximately $2.4 million in sports betting revenues for all of 2013—make in six months. (*Id.* ¶¶ 15- 18.)[7]

The NJTHA also bases its requested bond amount on the assumption that this case will take seven months to reach final judgment. There is no reason to believe that this case would take that long. Unlike *Christie I*, this case does not require the Court to decide issues of standing and the constitutionality of PASPA. This case simply requires a construction of the 2014 Sports Wagering Law to determine that it

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[7] Mr. Drazin also conflates Nevada revenue figures with Monmouth Park profit figures, ignoring all the costs that Monmouth Park likely would incur to operate sports betting, including overhead, salaries, taxes, any increase in rent charged by defendant NJSEA based on such expansion of gambling activities, and any percentage of revenues that would be captured by William Hill, the third-party operator that Monmouth Park has reportedly retained to operate its sports book.

does not comply with PASPA, a determination that can be resolved by summary judgment, which plaintiffs are prepared to seek quickly if this Court is not inclined to enter summary judgment *sua sponte* under the authority of *Markell*.

In light of the foregoing, the NJTHA's estimate of its purported lost profits cannot be accepted, and the current bond of $3.4 million posted in connection with the temporary restraining order is fully adequate—indeed, far exceeds—the amount necessary to secure any potential losses that Monmouth Park might sustain in the event that the injunction were improvidently granted. If any adjustment at all should be made to the amount of the bond, it should be reduced, not increased as the NJTHA has requested.

Conclusion

For the foregoing reasons, this Court should: (i) issue a preliminary injunction pending a judgment on the merits of plaintiffs' complaint enjoining defendants from sponsoring, operating, advertising, promoting, licensing or authorizing by compact any sports wagering scheme at any Atlantic City casinos or New Jersey racetracks, including, particularly, the Monmouth Park Racetrack; and (ii) enforce this Court's previous injunction against the *Christie I* defendants.

Dated: November 7, 2014

Respectfully Submitted,

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Caputo Statement on Federal Sports Gaming Ruling

Caputo Statement on Federal Sports Gaming Ruling (28th LEGISLATIVE DISTRICT) - Assembly Tourism and Gaming Chairman Ralph Caputo (D-Essex), the lead Assembly sponsor of efforts to bring sports gaming to New Jersey, released the following statement Friday on the federal court ruling delaying the start of betting:

"I'm disappointed in the judge's ruling. All it does is delay the inevitable.

"Sports gaming is a reality, albeit a mostly illegal one. All New Jersey is trying to

do is legally implement well regulated sports gaming and even the playing field

with other states. It's time for the courts to get out of the way and allow New

Jersey to decide its own gaming laws.
"I remain confident New Jersey will prevail in this case."

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

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November 17, 2014

Honorable Michael A. Shipp, U.S.D.J.
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for the District of New Jersey
Clarkson S. Fisher Building and U.S. Courthouse
402 East State Street
Trenton, New Jersey 08608

Re: *Nat'l Collegiate Athletic Ass'n v. Christopher J. Christie, et al.*,
No. 3:14-cv-6450 (MAS)(LHG)

Dear Judge Shipp:

This office represents Governor Christopher J. Christie, David L. Rebuck, and Frank Zanzuccki (the "State Defendants") in the above-referenced action. On November 10, 2014, the Court entered an order advising the parties that it "intends to consolidate the application for a preliminary injunction with a decision on the merits." The court invited the parties to

submit correspondence today concerning "additional considerations or issues in connection with such consolidation." In response to that Order, the State Defendants submit this letter and are contemporaneously filing a Statement of Undisputed Material Facts.

The Court's November 10 order did not indicate the procedure by which the Court intends to reach a decision on the merits in this action now, at a stage before any defendant has answered the Plaintiffs' complaint. In the view of the State Defendants, of two possible procedural avenues for doing so summary judgment under Federal Rule of Civil Procedure 56, or advancing the trial on the merits under Rule 65(a)(2)—summary judgment is the more appropriate.

This Court's Local Rule 56.1 provides that a movant for summary judgment "shall furnish a statement which sets forth material facts as to which there does not exist a genuine issue," and that a "motion for summary judgment unaccompanied by a statement of material facts not in dispute shall be dismissed." The State Defendants accordingly submit herewith a Statement of Undisputed Materials Facts so that, in the event the Court treats the briefing on the Plaintiffs' motion for a preliminary injunction as cross-motions for summary judgment, the Court will have before it the necessary support to grant summary judgment in favor of the State Defendants. The statement of undisputed facts references the 2014 Act at issue in this case, which is a matter of record. The Act states on its face that it is not and shall not be construed as a State authorization of sports wagering, and it explicitly repeals any law or regulation that would entangle

the State in the conduct of such activity where it is lawful. The State Defendants, moreover, have submitted declarations—unchallenged by Plaintiffs—making clear that, in accordance with the text of the 2014 Act, where sports wagering is lawful, State gambling regulators will have no involvement in it. The State Defendants respectfully submit that this uncontroverted evidence supports summary judgment in the State Defendants' favor.

The other procedural option for proceeding immediately to judgment is Rule 65(a)(2), which permits a court to "advance the trial on the merits and consolidate it" with the hearing on a motion for a preliminary injunction. The State Defendants respectfully submit that it would be inappropriate to hold the trial on the merits before any defendant has filed a responsive pleading. This is especially true here, where the State Defendants have put forward jurisdictional defenses under the Eleventh Amendment that bar subjecting the State Defendants to a trial.

For these jurisdictional reasons, and also because of the obvious practical difficulties of preparing for a trial on the merits just three days hence, the State Defendants suggest that summary judgment under Rule 56 is the more appropriate avenue for proceeding directly to a decision on the merits.

Respectfully, the State Defendants object to proceeding immediately to a trial on the merits. If the Court determines, over defendants' objections, to convert the hearing scheduled on November 20 into a trial on the merits, the State Defendants request that the three declarations submitted with its opposition to

the Plaintiffs' motion for a preliminary injunction be admitted as substantive evidence in that proceeding, without the need to call the declarants as live witnesses. *See* Fed. R. Civ. P. 65(a)(2) ("evidence that is received on the motion [for a preliminary injunction] and that would be admissible at trial becomes part of the trial record and need not be repeated at trial"). The State Defendants further request that Plaintiffs be ordered to produce immediately a list of exhibits on which they intend to rely at trial, and a list of witnesses whom they may call.

Respectfully submitted,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: _____
Jeffrey S. Jacobson
Director, Division of Law

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *et al.*, Plaintiffs, v. CHRISTOPHER J. CHRISTIE, *et al.*, Defendants.	Civil Action No. 3:14-06450 (MAS) (LHG) Honorable Michael A. Shipp, U.S.D.J. (Return date: November 20, 2014)

STATE DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

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In light of this Court's order, dated November 10, 2014, notifying the parties that it intends to reach the merits of Plaintiffs' claims, and inviting the parties to submit any additional documentation relevant to its decision to consolidate Plaintiffs' Motion for a Preliminary Injunction with a decision on the merits, Defendants Christopher J. Christie, David L. Rebuck, and Frank Zanzuccki (the "State Defendants") hereby submit this Statement of Undisputed Material Facts.

The Sports Wagering Market & Legal Framework

1. The Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et seq.*, makes it "unlawful" for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact ... a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive

games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." *Id.* § 3702.

2. Because Plaintiffs have not submitted any new evidence in support of their allegations, Defendants incorporate by reference the Statement of Undisputed Facts filed in the prior action in support of their Cross-Motion for Summary Judgment. *See* No. 12-4947, ECF 76-2 ("SUMF"). A few of the more salient facts are repeated below for convenience.

3. The amount of legal and illegal sports gambling in the United States has increased substantially since 1960. SUMF ¶ 7.

4. The annual volume of legal sports wagering in Nevada increased from approximately $1.5 billion shortly before PASPA's enactment to $2.9 billion in 2011. SUMF ¶ 8.

5. The total volume of sports wagering in the United States is estimated to be in the hundreds of billions of dollars annually, with the illegal sports wagering market having increased from an estimated $50 billion in 1989 (adjusting for inflation) to an estimated range of $270 to $500 billion in 2011. SUMF ¶ 15.

6. Less than 1 percent of the estimated betting on sports that occurs annually in the United States consists of wagers placed legally in Nevada. SUMF ¶ 16.

7. The Commissioner of the National Basketball Association has called for the repeal of PASPA and the expansion of government-sponsored sports betting, contending now that regulated sports wagering would be good public policy. *See* Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES, Nov. 13, 2014, available at http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html

New Jersey's Now-Repealed 2012 Sports Wagering Law ("2012 Law")

8. In 2012, following the voters' approval of an amendment to the New Jersey Constitution, the New Jersey Legislature legalized sports betting pools operated by New Jersey casinos and racetracks and provided for a detailed regulatory regime for sports wagering akin to the one currently governing other forms of casino gaming, such as poker, blackjack, or the simulcasting of horse racing. *See* Rebuck Decl. ¶ 4; N.J. Stat. Ann. § 5:12A-1 *et seq.*

9. The 2012 Law provided that the Division of Gaming Enforcement ("DGE") would have had general responsibility for, and served an active role in, promulgating and administering regulations specifically applicable to sports wagering at casinos and racetracks. Rebuck Decl. ¶ 4; Levinson Decl. ¶ 6.

10. Under the 2012 Law, a casino or racetrack was permitted to offer sports wagering only if it obtained a license from the State specifically authorizing such betting. N.J. Stat. Ann § 5:12A-2.

11. Under the 2012 Law, DGE would have had primary responsibility for issuing that sports wagering license, which was required "in addition to" any other license necessary to operate the casino or racetrack. N.J. Stat. Ann. § 5:12A-2; Zanzuccki Decl. ¶ 7.

12. Under the 2012 Law, only a casino licensed by the Casino Control Commission ("CCC") or a racetrack licensed by the New Jersey Racing Commission ("NJRC") would have been eligible for a license to operate a sports wagering pool. Levinson Decl. ¶ 6.

13. Key employees, such as those with managerial oversight or discretion over sports wagering operations or otherwise deemed, upon review of the CCC, to be "directly involved in sports pool wagering," would have required a license issued by the CCC as well. Levinson Decl. ¶ 6; N.J. Admin. Code § 13:69N-1.8.

14. After the enactment of the 2012 Law, DGE promulgated regulations to implement it. *See* Rebuck Decl. ¶ 4; N.J. Admin. Code § 13:69N *et seq.*

15. These regulations, which were subsequently enjoined by the federal courts and repealed by P. L. 2015, c. 62 ("2014 Act"), set forth the procedures and eligibility requirements for casinos and racetracks to obtain sports betting licenses. Rebuck Decl. ¶ 4.

16. Under the 2012 Law and the DGE regulations promulgated under it, sports pools would have been restricted to designated "sports lounges" within a casino or racetrack and would have been subject to

a number of detailed requirements, including using tested and approved equipment, utilizing the same kind of surveillance and security measures employed in other gaming areas within the casino, and displaying the wagering odds according to prescribed standards. Rebuck Decl. ¶ 5; N.J. Stat. Ann. § 5:12A-2(b), (c).

17. Under the 2012 Law, DGE also would have regulated a number of other aspects of sports wagering operations, akin to its regulation of other games, including, among others:

a. A sports pool's amount of cash reserves, N.J. Stat. Ann. § 5:12A-4(a); N.J. Admin. Code § 13:69N-2.5;

b. Acceptance of wagers on a series of sports events, N.J. Stat. Ann. § 5:12A-4(b);

c. Maximum wagers from any one patron on any one event, *id.* § 5:12A-4(c);

d. Types of permissible wagering tickets and methods by which they may be issued, *id.* § 5:12A-4(d), (e); N.J. Admin. Code § 13:69N-2.3(b);

e. Methods of accounting to be used by operators, N.J. Stat. Ann. § 5:12A-4(f); N.J. Admin. Code § 13:69N-1.11;

f. Systems of internal controls, including the "reconciliation of assets and

documents contained in the wagering cashier's drawers" and reporting of any overage or shortage, N.J. Admin. Code § 13:69N-2.2(d);

g. Types of records to be kept, N.J. Stat. Ann. § 5:12A-4(g);

h. Examination of accounts and records by state officials, N.J. Admin. Code § 13:69N-3.1(d);

i. Patrons' payment methods, N.J. Stat. Ann. § 5:12A-4(h);

j. Types of systems used for wagering, *id.* § 5:12A-4(i); N.J. Admin. Code § 13:69N-1.12;

k. Protections for persons placing wagers, N.J. Stat. Ann. § 5:12A-4(j); N.J. Admin. Code § 13:69N-1.9;

l. Display of the 1-800-GAMBLER hotline, N.J. Stat. Ann. § 5:12A-4(k);

m. Maintenance of exclusion lists, *id.* § 5:12A-2(e); and

n. Adoption of comprehensive house rules governing sports wagering transactions, covering things such as the amount to be paid on winning wagers and the effect of schedule changes, *id.* § 5:12A-5.

18. In conjunction with DGE, NJRC also would have played a role in giving approval to any vendor or operator employed by a racetrack to offer sports wagering. Zanzuccki Decl. ¶ 7; N.J. Stat. Ann. § 5:12A-2.

19. The vendor approval process under the 2012 Law would have involved, among other things, a criminal background check and an investigation of the vendor's financial health. Rebuck Decl. ¶ 7.

20. The 2012 Law and all of the regulations promulgated thereunder have been repealed by the 2014 Act. Rebuck Decl.¶ 4.

New Jersey's 2014 Act

21. On October 16, 2014, the New Jersey Legislature overwhelmingly passed the 2014 Act, which is designated as "[a]n Act partially repealing the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sports contests or athletic events." P. L. 2015, c. 62 at 2:1–3.

22. The 2014 Act states that it separately repeals: (a) the 2012 Law in its entirety, *see* P. L. 2015, c. 62, § 5; (b) provisions in the New Jersey criminal code (N.J. Stat. Ann. § 2C:37 *et seq.*), the New Jersey civil code (*id.* § 2A:40 *et seq.*), including the Casino Control Act (*id.* § 5:12-1 *et seq.*), other provisions of chapter 5 of Title 5 of the Revised Statutes (which regulate racetracks), as well as any other rules or regulations that prohibit participation in or operation of sports pools, to the extent those laws apply at consenting racetracks, casinos, and certain former racetracks,

see P. L. 2015, c. 62, § 1; and (c) "any rules and regulations that may require or authorize any State agency to license, authorize, permit, or otherwise take action to allow any person" to engage in sports wagering, *id.*

23. The 2014 Act explicitly states that it shall not be construed to sponsor, operate, advertise, promote, license or authorize by law sports wagering. P. L. 2015, c. 62, § 2.

24. The 2014 Act, unlike the 2012 Law, is entirely self-executing and requires no action on the part of any regulator at DGE, CCC, or NJRC in order to take effect. Rebuck Decl. ¶ 7; Zanzuccki Decl. ¶ 8.

25. The 2014 Act prohibits any of the regulators from applying or enforcing any of the provisions of the Casino Control Act, which, in the absence of the 2014 Act, otherwise would have applied to sports wagering. Rebuck Decl. ¶ 11.

26. The 2014 Act likewise prohibits any of the regulators from applying or enforcing any of the laws and regulations governing other forms of wagering at racetracks, such as pari-mutuel wagering or simulcasting, which, in the absence of the 2014 Act, may have applied to sports wagering. Zanzuccki Decl. ¶ 10.

27. Neither DGE nor NJRC may investigate the background or financial health of any on-premises sports wagering vendors, nor may they mandate which vendor a casino or racetrack may employ. Rebuck Decl. ¶ 7; Zanzuccki Decl. ¶ 8.

28. Unlike the 2012 Law, which required sports pool operators to obtain a license, and restricted the individuals or entities who could apply for a license to casinos and racetracks exclusively, the 2014 Act permits private parties to operate a sports pool on the premises of a casino or racetrack and does not require them to obtain a sports pool license from the State in order to operate their pool. Levinson Decl. ¶¶ 6, 8; Rebuck Decl. ¶ 7.

29. Unlike the 2012 Law, which required some "key" employees (as that term is defined in N.J. Stat. Ann. § 5:12-9) to have a license to work at a sports wagering pool, the 2014 Act does not require "key" sports wagering pool employees to obtain a license for that purpose. Levinson Decl. ¶ 7.

30. Under the 2014 Act, the CCC will have no role at all in evaluating "key" employees or their credentials. Levinson Decl. ¶ 7.

31. The 2014 Act leaves the CCC with no regulatory authority with respect to sports wagering. Levinson Decl. ¶ 8.

32. Unlike the 2012 Law, the 2014 Act prevents DGE from enforcing or maintaining a voluntary self-exclusion list of persons who are to be prohibited from participating in a sports wagering pool, even though such lists are maintained for other games within the casino. Rebuck Decl. ¶ 8.

33. Pursuant to the 2014 Act, DGE will not require sports pool lounges to use the same surveillance and security measures that it requires for other gaming areas. Rebuck Decl. ¶ 9.

34. Neither DGE nor NJRC will have any direct role in enforcing, or prosecuting violations of, criminal or civil laws, such as the consumer fraud protection statutes, that apply to all persons and businesses equally throughout the State, and any crimes involving sports wagering pools or participants will be handled the same way as any other crime involving any other person or business. Zanzuccki Decl. ¶ 9; Rebuck Decl. ¶ 10.

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35. Under the 2014 Act, DGE will not monitor or concern itself with whether a casino elects to operate a sports pool, or the way a casino goes about operating a sports pool. DGE now considers sports wagering to be "non-gambling activity" akin to fantasy sports betting or "social gaming" that is beyond DGE's control or regulatory authority. Rebuck Decl. ¶ 12.

Dated: November 17, 2014

Respectfully submitted,

By: /s/ Jeffrey Jacobson

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November 17, 2014

BY ECF

Hon. Michael A. Shipp, U.S.D.J.
U.S. District Court for the District of New Jersey
Clarkson S. Fisher Building and U.S. Courthouse
402 East State Street
Trenton, NJ 08608

RE: National Collegiate Athletic Association, et al. v.
Christopher J. Christie, et al., C.A. No. 3:14-cv-6450 (MAS)(LHG)

Dear Judge Shipp:

We represent Defendant New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA") in the above-referenced action. On November 10, 2014, Your Honor entered a Text Order advising the parties "that the Court intends to consolidate the application for a

preliminary injunction with a decision on the merits." On behalf of the NJTHA, we respectfully object to the consolidation referred to in Your Honor's Text Order.

The Text Order does not cite the Federal Rule of Civil Procedure under which it is issued. We assume (because it is the relevant Rule dealing with consolidating a preliminary injunction hearing with a trial on the merits) that the Court is acting pursuant to Federal Rule of Civil Procedure 65(a)(2), which provides:

> *Consolidating the Hearing with the Trial on the Merits.* Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

As its text makes clear, what Rule 65(a)(2) permits the Court to do is to "advance the trial on the merits." Under Rule 65(a)(2), the preliminary injunction hearing itself would be converted into the actual trial on the merits, whether it be a jury or non-jury trial.

In an effort to facilitate a prompt decision on the plaintiffs' motion for a preliminary injunction, we agreed in an October 27 joint letter to Your Honor (i)

to take no discovery in connection with plaintiffs' preliminary injunction motion, (ii) not to insist on an evidentiary hearing on that motion, and (iii) that the proceeding on November 20, 2014, would consist only of oral argument. Our agreement to forego discovery and an evidentiary hearing on plaintiffs' request for a preliminary injunction (where a plaintiff need show a likelihood of success on the merits but not fully prove its case) was not meant to be, nor was it, a waiver of NJTHA's right to have a trial on the merits. The NJTHA has not, and will not, waive its right to a full trial on the merits.

At the outset, it is important to note that "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Any decision whether to consolidate under Rule 65(a)(2) "must be tempered by the due process principle that fair notice and an opportunity to be heard must be given the litigants before the disposition of a case on the merits." *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 913 (1st Cir.1989) (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2950 (1st ed.1973)). A "district court must provide 'clear and unambiguous notice ... before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *American Train Dispatchers Dep't of Int'l Bhd. v. Ford Smith R.R. Co.*, 121 F.3d 267, 270 (7th Cir. 1997) (quoting *Pughsley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972)). "Accordingly, ordering consolidation during the course of a preliminary-injunction hearing is reversible error when little or no

notice is given of this change and the effect is to deprive a party of the right to present the case on the merits." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 2950 (3d ed. 2013).

If the Court intends, by its Text Order, to mean that it intends to advance and conduct the full trial on the merits on Thursday, November 20, 2014, then we object because to do so would deprive the NJTHA of fair notice and an opportunity to be heard. At a trial on the merits, whether jury or nonjury, the plaintiffs will bear the burden of proof, by a preponderance of the evidence, on each and every element of their claims, including proof of irreparable harm. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) ("[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006))). In addition to cross-examining the plaintiffs' witnesses, the NJTHA will need to call witnesses both to respond to the plaintiffs' evidence and to support its

own affirmative defenses, including unclean hands.[1] Further, we will need the opportunity to offer proofs as to the hardships the NJTHA and public will sustain if an injunction is granted. None of this can possibly happen a mere three days from today.

This case is at its earliest stages. Plaintiffs' Complaint was filed on October 20, 2014. Counsel for the NJTHA agreed to accept service on behalf of NJTHA on November 4, 2014. The NJTHA's Answer with Affirmative Defenses is not due, at the earliest, until November 25, 2014. Nor is any decision whether to make a jury demand due before that date. *See* Fed. R. Civ. P. 38.

Though we have not been so advised, plaintiffs may agree that a full trial on the merits cannot possibly take place on November 20. They may suggest that summary judgment would be appropriate. *See* Leagues' Reply Brief at 8 (suggesting that "this Court currently has all of the information it needs to render summary judgment in plaintiffs' favor"). But the

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[1] The witnesses called by the NJTHA may well include officers and employees of the plaintiffs. If those witnesses do not appear voluntarily and are beyond this Court's trial subpoena power, *see* Fed. R. Civ. P. 45(c), a deposition will be necessary in order to present their testimony at trial. *See* Fed. R. Civ. P. 32(a) (governing use of depositions at trial). But under Rule 26(d), the NJTHA cannot even notice such depositions, because it is simply too early in the case to do so. Indeed, even if somehow a deposition were conducted before November 20, 2014, it might not be admissible in evidence precisely because of the insufficient time between the noticing of the deposition and its taking. *See* Fed. R. Civ. P. 32(a)(5) (limiting the use of depositions taken on less than 14 days' notice).

plaintiffs have not moved for summary judgment, nor does Your Honor's Text Order cite to Rule 56.[2] Plaintiffs have done nothing to "identify[] each claim or defense or the part of each claim or defense on which summary judgment is sought." They have not "show[n] that there is no genuine dispute as to any material fact and [they are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). They have not "support[ed]," as they "must," any assertion "that a fact cannot be ... genuinely disputed" by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c). Nor have the plaintiffs complied with this Court's Local Rule 56.1, and submitted "a separate document (not part of a brief)," that does "not contain legal argument or conclusions of law," consisting of "a statement which sets forth material facts as to which there does not exist a genuine issue, in separately numbered paragraphs citing to the affidavits and other documents submitted in support of the motion." As Local Rule 56.1 makes clear, "[a] motion for summary judgment unaccompanied by a statement of material facts not in dispute shall be dismissed." We, therefore, respectfully object to converting the preliminary injunction hearing on November 20 into a hearing on plaintiffs' suggestion (not motion)

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[2] Plaintiffs' citation to *Office of the Commissioner of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009) (Leagues' Reply Brief at 8-9) does not support their position here for several reasons, including, *inter alia*, the fact that the *Markell* decision was decided before the 2010 amendments to Rule 56.

that this case may be appropriate for disposition by summary judgment.

To the extent Your Honor may be considering a summary judgment *sua sponte*, we respectfully object. The Court may "consider summary judgment on its own," without awaiting a motion by a party, *see* Fed. R. Civ. P. 56(f), though, as the Advisory Committee Notes observe, "in many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c)." 2010 Advisory Committee Notes on Fed. R. Civ. P. 56(f). The case law, however, cautions great care be used before granting summary judgment *sua sponte*. *See, e.g.*, *First American Kickapoo Operations, LLC v. Multimedia Games, Inc.*, 412 F.3d 1166, 1170 (10th Cir. 2005) ("we do not encourage the practice of granting summary judgment *sua sponte*"); *Massey v. Congress Life Ins. Co.*, 116 F.3d 1414, 1417 (11th Cir. 1997) ("[D]istrict courts must temper their exercise of [the] power [to trigger summary judgment on their own initiative] by the need to ensure that the parties receive adequate notice that they must bring forward all of their evidence."); *Ramsey v. Coughlin*, 94 F.3d 71, 74 (2d Cir. 1996) ("Before granting summary judgment *sua sponte*, the district court must assure itself that following the procedures set out in Rule 56 would not alter the outcome. Discovery must either have been completed, or it must be clear that further discovery would be of no benefit. The record must, therefore, reflect the losing party's inability to enhance the evidence supporting its position and the winning party's entitlement to judgment."); *Wilkins v. Wetzel*, No. 2:12-CV-1152, 2013 WL 5504491, at *9 (W.D. Pa. Oct.

3, 2013) ("A court's *sua sponte* grant of summary judgment must be undertaken with the utmost caution given the serious consequences to the adversarial party.") Further, before a court can grant summary judgment *sua sponte*, it must first give "notice and a reasonable time to respond." *See, e.g.*, *Atkins v. Salazar*, 677 F.3d 667, 678 (5th Cir. 2011) ("[W]e have vacated summary judgements [sic] and remanded for further proceedings where the district court provided no notice prior to granting summary judgment *sua sponte,* even where summary judgment may have been appropriate on the merits," (quoting *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1398 (5th Cir. 1994))).

As of the date of this letter–again, a mere three days before the scheduled oral argument–the Court has provided no notice that it is considering summary judgment *sua sponte*. The Court's Text Order cannot be viewed as providing such notice, because it does not refer to summary judgment, and instead refers to consolidating the preliminary injunction with the merits, a clear reference to Federal Rule of Civil Procedure 65(a)(2). Moreover, the Text Order does not "identify[] for the parties material facts that may not be genuinely in dispute," as Rule 56(f) requires. Therefore, we respectfully object to Your Honor converting the November 20 preliminary injunction hearing into a *sua sponte* summary judgment hearing.

Even if the plaintiffs had timely moved for summary judgment, or the Court had given sufficient notice of an intent to consider summary judgment on its own, converting the November 20 preliminary injunction hearing into a summary judgment hearing would

be improper. For example, the NJTHA intends to assert plaintiffs' unclean hands as an affirmative defense, thereby barring plaintiffs from obtaining the equitable relief they seek in this action. To support the NJTHA's unclean hands defense, the NJTHA intends to seek document and deposition discovery from each of the plaintiffs regarding their actions and statements that are completely inconsistent with their efforts to enjoin the NJTHA in this action.

The NJTHA intends to pursue depositions and documentary discovery regarding the relationship between the plaintiffs, the plaintiffs' individual teams, and the plaintiffs' individual players with professional gamblers, gambling business enterprises inside and outside the United States, and fantasy sports businesses. The NJTHA will also seek discovery regarding the fantasy sports businesses sponsored and/or owned by the plaintiffs, the plaintiffs' players who participate in fantasy sports wagering, as well as fantasy sports participants who have relationships with the plaintiffs, their teams, or the plaintiffs' players.

In particular, the NJTHA intends to seek discovery concerning the plaintiffs' investment and other involvement in daily and weekly fantasy betting on their respective sports, including that of the NFL, the NBA, the NHL, and Major League Baseball. *See, e.g.*, Darren Heitner, *FanDuel and DraftKings Dueling Over Team and League Partnerships*, Forbes (November 14, 2014), http://www.forbes.com/sites/darrenheitner/2014/11/14/fanduel-and-draftkings-dueling-over-team-and-league-partnerships/2/, attached to the accompanying Certification of Ronald J. Riccio ("Riccio Certification") as Exhibit A; Marc Edelman, *7 Legal*

Risks of the NBA Investing in FanDuel, Forbes (November 13, 2014), http://www.forbes.com/sites/marcedelman/2014/11/13/7-legal-risks-of-the-nba-investing-infanduel/, attached as Exhibit B to the Riccio Certification. These articles make it clear that the Leagues have become business competitors of the NJTHA with regard to sports betting rather than supposed guardians of their reputations or the integrity of their games. As the NJTHA's business competitors, who have huge economic incentives to protect, the NJTHA may well have counterclaims against the Leagues.[3]

Recent comments by NBA Commissioner Silver extolling the benefits of sports betting on NBA games (Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. Times (November 14, 2014), http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0, attached as Exhibit C to the Riccio Certification), echoed by Dallas Mavericks owner Mark Cuban (Ken Berger, *Cuban: Silver 'Exactly Right" on Sports Betting* (November 14, 2014),

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[3] Discovery is needed, for instance, to determine the extent to which the Leagues themselves as well as their players (without apparently any objection whatsoever from the Leagues) participate and promote gambling on the "performances" of League athletes, which lie at the heart of fantasy sports betting games. Based on information on the Leagues' and other fantasy sports betting company websites, the investment and participation in, and promotion of, fantasy sports by the plaintiffs, its member teams, and its players is greater now than ever before.

http://www.cbssports.com/nba/writer/ken-berger/24806648/cuban-silvercexactly-right-on-sports-betting, attached as Exhibit D to the Riccio Certification), are proper subjects for discovery with respect to the Leagues' alleged irreparable injury and the public interest.[4]

Whoever is the losing party on plaintiffs' application for a Preliminary Injunction will, in all probability, appeal, as of right, to the Court of Appeals for the Third Circuit. 28 U.S.C. 1292(a). While the record on appeal will be sufficient for purposes of reviewing the Court's decision to grant or deny a Preliminary Injunction, the appellate record will be woefully inadequate for the Circuit to review any final judgment on the merits, *i.e.*, no Answer to the Complaint, no discovery, no opportunity to evaluate counterclaims, no trial testimony from material witnesses, and no compliance with any of the rules governing disposition of summary judgment motions.

We respectfully submit that it would be fundamentally unfair to the NJTHA to convert the November 20 oral argument on plaintiffs' motion for a Preliminary Injunction into either a trial on the merits or a summary judgment hearing. To attempt to have a trial on the merits or summary judgment hearing on

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[4] For similar reasons, discovery is needed with respect to the "Devils and the Philadelphia 76ers partner[ing] with an online gambling company." *See* Ken Belson, Will Other Leagues Join NBA? Don't Bet on It, N.Y. Times (November 14, 2014), http://www.nytimes.com/2014/11/15/sports/not-all-leagues-ready-to-go-all-in-on-legalized-gambling.html?ref=sports, attached as Exhibit E to the Riccio Certification.

November 20 will deprive the NJTHA's more than 3,000 members of their fundamental Due Process rights to have their day in Court after fair notice and a reasonable opportunity to be heard.

Respectfully submitted,

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP

/s/ Ronald J. Riccio
Ronald J. Riccio

cc: Counsel of Record (by ECF)

EXHIBIT A

FanDuel and DraftKings Dueling Over Team And League Partnerships

The biggest news concerning FanDuel this week revolves around a new partnership that it has brokered with the National Basketball Association (NBA), which is a four year deal that includes FanDuel's commitment to make an investment in the daily fantasy sports website. However, the same day that a league-wide deal was announced by the NBA and FanDuel, the daily fantasy sports operator also entered into a business relationship with the Dallas Mavericks, a team TISI -0.49% that performs within the Western Conference of the NBA. The week of November 10-14, 2014 may go down as the largest week for daily fantasy sports' related announcements in the history of the sector. It began on Monday with DraftKings revealing its own league-wide partnership with the National Hockey League (NHL) and may end with FanDuel's announcement of its first agreement with a National Football League (NFL) team — the Washington Redskins — an arrangement that is being referred to as a "fully integrated marketing agreement," that will prominently showcase FanDuel in-stadium, on Redskins' digital and social media platforms, as well has include retired tight end Chris Cooley taking an active role in promoting the fantasy sports operator. "The Washington Redskins executive team is forward thinking, innovative and run a world-class operation," said FanDuel CEO Nigel Eccles this morning. "The Redskins are an invaluable strategic partner for FanDuel as we continue to bring one-day fantasy football to the masses." There appears to be a

type of 'gold rush' between the fantasy giants in securing partnerships with major professional sports leagues and the teams situated therein.

According to information provided by FanDuel, in addition to deals already discussed with the NBA, Dallas Mavericks and Washington Redskins, the daily fantasy sports operator also has partnerships with the NBA's Orlando Magic, Brooklyn Nets, New York Knicks and Chicago Bulls. Additionally, FanDuel has a partnership with sports writer Jay Glazer. DraftKings also currently has one NFL team partnership in place, and it is with the New England Patriots. In addition to its partnership with the NHL on a league-wide basis, DraftKings has been busy signing up individual teams to assist in promotional efforts, including the Boston Bruins, St. Louis Blues and New York Rangers. The "league level" has appeared to be of importance to the operator, which has also entered into partnerships with Major League Baseball (MLB), World Series of Poker, World Poker Tour and most recently partnered with the Breeders Cup in August. DraftKings also has a deal in place with Fox Sports.

FanDuel does not list any MLB teams as being sponsors and DraftKings advises that while it had entered into formal relationships with eight baseball teams, including the Boston Red Sox and Kansas City Royals, those deals have expired and new contracts will be signed for the upcoming MLB season.

The next big announcement may be the NFL entering into a partnership with one of the major daily fantasy sports operators. With the NBA signed to a deal with FanDuel and DraftKings dominating MLB

and NHL, both daily fantasy sports entities will likely be pushing hard to create an association with the NFL, which is widely regarded as the most attractive professional sports league in the United States. Additionally, only two NFL teams are currently under contract with either FanDuel or DraftKings (the Redskins and Patriots, respectively). It should be expected that many more announcements will be coming regarding such team-level partnerships as well.

Separately, FanDuel's partnership agreement with the NBA does not preclude DraftKings from expanding its reach in the sport of basketball by associating it with individual teams within the league. DraftKings is said to have its sights on the Los Angeles Clippers, Golden State Warriors and a handful of other teams, including the Boston Celtics, which is based in the same city where DraftKings' headquarters are located.

Meanwhile, new entrants appear to be unfazed by the dominance asserted by FanDuel and DraftKings in the daily fantasy sports space. Despite FanDuel reporting revenue of $8.9 million in Q3 of 2014, startups like FantasyDraft are sprouting up with support of their own. FantasyDraft announced its creation with the signing of endorsement contracts with NFL wide receivers T.Y. Hilton of the Indianapolis Colts and Jordy Nelson of the Green Bay Packers. Of course, the announcement of FantasyDraft's launch occurred this week, the same week that was already loaded with major daily fantasy sports news.

Darren Heitner is a lawyer and the Founder of South Florida-based HEITNER LEGAL, P.L.L.C.,

which has a focus on Sports Law and Entertainment Law.

EXHIBIT B

7 Legal Risks Of The NBA Investing In FanDuel

Marc Edelman

Yesterday, NBA owners made the unprecedented decision to become equity investors in the daily fantasy sports business, FanDuel. Unlike its past sponsorship of Yahoo fantasy sports contests, the NBA's newest investment allows the league to profit directly from the fantasy games themselves. However, the NBA's investment in FanDuel is not without legal risks. Here are seven legal risks that NBA attorneys now must manage as partners in FanDuel:

1. **Does FanDuel operate in any states where its contests are illegal?** Currently, FanDuel disallows participants from entering its games in five states where it perceives the risks as most elevated: Arizona, Louisiana, Iowa, Montana, and Washington. However, there are other states where daily fantasy sports contests also seem risky. For example, the State of Tennessee seems to disallow online contests that involve any chance. Meanwhile, the State of Kansas implies on its website that all fantasy sports contests with entry fees are illegal. To avoid potential liability, the NBA may wish for FanDuel to block entrants in additional states such as Kansas and Tennessee.

2. **Does FanDuel do enough to block users in these impermissible states?** The publicly traded sportsbook, the William Hill Co., recognizes that it is so strongly in its business interest that U.S.

residents do not access their website that they use Internet Protocol Tracking Technology to prevent those based in the U.S. from even getting to the website's front page. By contrast, it is possible to access at least FanDuel's main page from some impermissible states. Now with the NBA is a partner; FanDuel may wish to implement Internet Protocol Tracking Technology to block the entirety of its website from users in impermissible states–thus preventing any mistake or confusion.

3. Can minors play for money on FanDuel? Obviously FanDuel's terms of service prevent minors from entering, but few of the daily fantasy sports contests have found a way to truly prevent the practice if a minor has access to a family credit card or PayPal account. With the NBA's backing, it may be possible for FanDuel to come up with even more secure methods to ensure minors cannot access paid games. One possibility might involve borrowing some of the technologies currently utilized by the more reputable companies in other adult entertainment marketplaces. Alternatively, the NBA may wish to seek its own experts in developing and enhancing such technologies.

4. Can a FanDuel user who loses a lot of money successfully sue the NBA to recover it? Here, the risks are probably low given that at least one recent court ruling found that FanDuel was a website operator and not a gambling winner subject to disgorgement of winnings. However, if FanDuel were to change its gaming format to allow contests against the house instead of other players (much as the company BetAmerica currently does), this risk of

disgorgement would increase substantially. FanDuel has wisely stayed out of the "play to house" model so far. Presumably with the NBA's new backing it will continue to do so.

5. What happens when the first FanDuel user goes bankrupt? With any form of online gaming from traditional sports betting to the day-trading of stocks, it seems inevitable that a small segment of the participant base will suffer from a form of gambling addiction and ultimately lose a substantial amount of savings. While this may not lead to direct lawsuits, the publication of such outcome could hurt the image of the NBA. One of the challenges for the NBA will thus be a way to try to help develop gambling caps, and methods of ensuring those most at risk of a gambling addiction do not end up able to go bankrupt by playing in contests its "company" sponsors.

6. Is the NBA now perceived as endorsing adult content other than just online gaming? Now that the NBA is an "investor" in FanDuel, it is also an investor in a company that maintains contests sponsored by Playboy Magazine. Of course, there is a large segment of the U.S. population who loves "reading" Hugh Hefner's magazine as much as they love online gaming and sports. But, is it appropriate for the NBA to be involved in a business venture with a magazine that provides such adult content? Moreover, even if so, does the sponsorship conflict with the core identity that the NBA wishes to promote to its fans?

7. Does the NBA/FanDuel partnership increase the possibility of NBA games being fixed? The odds of NBA involvement in FanDuel leading to

game fixes seems remote, and perhaps the NBA's direct involvement in one of these games will better prepare the league to adopt policies to prevent such as result than if the NBA remained not involved. Yet, the NBA will still needs for its lawyers to craft reasonable policies about owner and employee participation in daily fantasy sports contests, as well as dissemination of information that could impact contest results.

To this ends, it will be important for the NBA to soon begin discussions with the National Basketball Players Association and other constituent groups on these matters. The league will also need more formal protocol for the disclosure of "insider information" such as unreported player injuries and rotational lineup changes.

Marc Edelman is an Associate Professor of Law at the City University of New York's Baruch College, Zicklin School of Business, where he has published more than 25 law review articles including "A Short Treatise on Fantasy Sports and the Law." He also provides legal and business consulting to numerous fantasy sports businesses. Nothing contained in this article should be construed as legal advice.

EXHIBIT C

Legalize and Regulate Sports Betting

NBA Commissioner Adam Silver: Allow Gambling on Pro Games

By ADAM SILVER NOV. 13, 2014

BETTING on professional sports is currently illegal in most of the United States outside of Nevada. I believe we need a different approach.

For more than two decades, the National Basketball Association has opposed the expansion of legal sports betting, as have the other major professional sports leagues in the United States. In 1992, the leagues supported the passage by Congress of the Professional and Amateur Sports Protection Act, or PASPA, which generally prohibits states from authorizing sports betting.

But despite legal restrictions, sports betting is widespread. It is a thriving underground business that operates free from regulation or oversight. Because there are few legal options available, those who wish to bet resort to illicit bookmaking operations and shady offshore websites. There is no solid data on the volume of illegal sports betting activity in the United States, but some estimate that nearly $400 billion is illegally wagered on sports each year.

Times have changed since PASPA was enacted. Gambling has increasingly become a popular and accepted form of entertainment in the United States.

Most states offer lotteries. Over half of them have legal casinos. Three have approved some form of Internet gambling, with others poised to follow.

There is an obvious appetite among sports fans for a safe and legal way to wager on professional sporting events. Mainstream media outlets regularly publish sports betting lines and point spreads. Voters in New Jersey overwhelmingly voiced their support for legal sports betting in a 2011 referendum. Gov. Chris Christie of New Jersey recently signed a bill authorizing sports betting at local casinos and horse racetracks, a law the NBA and other leagues have opposed—and a federal court has blocked—because it violates PASPA.

Outside of the United States, sports betting and other forms of gambling are popular, widely legal and subject to regulation. In England, for example, a sports bet can be placed on a smartphone, at a stadium kiosk or even using a television remote control.

In light of these domestic and global trends, the laws on sports betting should be changed. Congress should adopt a federal framework that allows states to authorize betting on professional sports, subject to strict regulatory requirements and technological safeguards.

These requirements would include: mandatory monitoring and reporting of unusual betting-line movements; a licensing protocol to ensure betting operators are legitimate; minimum-age verification measures; geo-blocking technology to ensure betting

is available only where it is legal; mechanisms to identify and exclude people with gambling problems; and education about responsible gaming.

Without a comprehensive federal solution, state measures such as New Jersey's recent initiative will be both unlawful and bad public policy.

Let me be clear: Any new approach must ensure the integrity of the game. One of my most important responsibilities as commissioner of the NBA is to protect the integrity of professional basketball and preserve public confidence in the league and our sport. I oppose any course of action that would compromise these objectives.

But I believe that sports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated.

EXHIBIT D

Cuban: Silver 'exactly right' on sports betting

November 14, 2014 12:05 pm ET

In an op-ed in the *New York Times*, NBA commissioner Adam Silver argues that it is time to legalize sports betting. He has the full support of at least one influential owner.

"Adam has it exactly right," Dallas Mavericks owner Mark Cuban told CBSSports.com Friday.

The NBA and other major American sports leagues, along with the NCAA, have opposed a New Jersey law that would allow sports wagering at the state's racetracks and casinos. The law was struck down in federal court last month, but more appeals are expected.

The NBA's problem with that particular law is that it violates a federal statute that prohibits sports betting in all but four states: Nevada, Delaware, Montana and Oregon. Change the federal law, and you take what Silver describes as "a thriving underground business" and subject it to "strict regulatory requirements and technological safeguards."

In contrast to NFL commissioner Roger Goodell, who said earlier this year that he doesn't envision his league dropping its opposition to legalized sports betting, Silver argues that the illegal activity is happening anyway, to the tune of $400 billion annu-

ally. Leagues like the NBA, Silver says, should be involved in policing, regulating and monitoring the activity that thrives off their businesses.

"I believe that sports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated," Silver said.

In an email exchange with CBSSports.com, Cuban said he believes Silver realizes that it's "hypocritical" of sports leagues to reward and endorse fantasy sports but oppose sports betting. Silver's op-ed was published online a day after the NBA announced a fantasy sports partnership with FanDuel, a CBS Sports sponsor.

"We all know leagues benefit from the interest in our leagues that [gambling and fantasy sports] create," Cuban said. "In the past for PR reasons, we have put up token resistance to them. I agree with Adam that now is the time to take sports betting out of the shadows and deal with it like the huge business it is."

After the Mavs' 53-point victory over the Tankadelphia [sic] 76ers on Thursday night, it's a safe bet that Cuban and Silver don't see eye-to-eye on draft lottery reform. Sports betting, on the other hand, is an issue they can agree on—in large part because both stand to make a lot more money as a result.

But how?

That's where a sports league advocating for legalized wagering on its enterprise gets tricky. If billlions [sic] of dollars change hands in an activity

that couldn't exist without pro sports competition, shouldn't the purveyors of that competition get a cut of the action?

And if so, wouldn't that make the sports leagues complicit in an activity that by its very nature poses a risk to the sanctity of competition, as in the 2007 Tim Donaghy scandal? Further, who's to say the government and leagues could regulate sports betting any better than the illegal bookmakers have for decades?

Silver's essay makes no mention of any potential financial stake that the NBA or any other sports league would have in legalized gambling. And maybe they wouldn't need one. Since the states and/or federal government presumably would tax the activity, maybe that would just give sports teams more kickbacks, tax breaks and public funds to tap into when they want you to pay for new stadiums and arenas to host the events that are generating all this new revenue.

It's a treacherous undertaking fraught with the potential for plenty of unintended consequences. Just remember something that even Silver would tell you: Never, ever take the Sixers and the points.

EXHIBIT E

Will Other Leagues Join NBA? Don't Bet on It

By KEN BELSON NOV. 14, 2014

There is no shortage of ways for fans to bet on sports, even though federal law forbids gambling on games in almost all states: Fantasy leagues, state-run lotteries and neighborhood bookies, as well as online offshore ones, will take a fan's action.

For decades, professional sports leagues have steadfastly opposed gambling and backed the prohibition of betting on games because they claimed it would undermine their sports' integrity and lead to questions about the honesty of players and referees.

But the leagues, eager for a slice of a multibillion-dollar moneymaker, have also tiptoed around their own opposition. NFL teams have licensing deals with state lotteries and have pushed to establish a franchise in London, where betting shops are ubiquitous.

Major League Baseball, the NBA and the N.H.L. all work with fantasy sports companies. This year, the Devils and the Philadelphia 76ers partnered with an online gambling company. Other teams are joining the trend.

NBA Commissioner Adam Silver went a lot further on Friday, however, when he became the first chief of a major American sports league to call for federal sports betting laws to be changed so states can allow betting on games. In an article on the Op-Ed

page of The New York Times, he acknowledged that despite laws prohibiting it, sports betting is a "thriving underground business that operates free from regulation or oversight."

Any expansion of sports gambling, he added, should be monitored, with reporting of unusual betting-line movements, verification that betting operators are legitimate and other measures to regulate activity.

Left unsaid was how much money the leagues and their owners stand to make. According to some estimates, the sports betting industry is worth more than $400 billion globally. Bookmakers typically take a 10 percent fee for handling a bet, and if the leagues take a slice of that, teams could receive millions of dollars more each year.

"If you're an owner of a team, it's a major revenue opportunity," said Jeffrey Standen, the dean of the Chase College of Law at Northern Kentucky University. "The pro sports leagues reap very little of what is produced off of sport gambling. The other shoe will one day drop."

To date, the NBA has partnered with other professional sports to oppose changes to the Professional and Amateur Sports Protection Act, known as PASPA, which outlawed sports betting in all but a few instances, and the leagues would all need to be persuaded to lobby the government to change or overturn the law. They have opposed efforts by Gov. Chris Christie to legalize sports gambling in New Jersey.

On Wednesday, however, the NBA announced that it took a stake in the daily fantasy sports site FanDuel, which allows players to play in money tournaments and bet among each other. That arrangement could be expanded. The league's spokesmen said the NBA would continue to oppose the New Jersey case because without a comprehensive federal framework, New Jersey's approach was "illegal as well as bad public policy."

On Friday, the other leagues stood firm in their defense of PASPA. Brian McCarthy, a spokesman for the NFL, said Silver's view "doesn't change our stance that has been articulated for decades: no gambling on NFL games."

Bill Daly, the deputy commissioner of the N.H.L., was more nuanced. "That was Adam's opinion, and certainly one he and the NBA are entitled to," Daly wrote in an email. "That does not mean we share it. I think there are several assertions he relies on that we might question, or certainly would want to test further, and there are other considerations not mentioned that we think are relevant. It is a complex issue and, at least from our perspective, one that does not lend itself easily to a simple 'agree' or 'disagree.'"

Those in the gambling industry, of course, are cheering Silver on. "We agree with Commissioner Silver that a legal and regulated sports betting industry, like we have in Nevada and elsewhere in the world, is the best way to protect the integrity of sporting events," said Joe Asher, the chief executive of William Hill US in Nevada.

Though any immediate shift in federal gambling laws is a long shot, leagues have in the past changed their views when money was involved. For years, leagues did not take money from liquor companies that wanted to advertise in arenas and stadiums. That opposition dissolved a few years ago when the recession constrained advertising.

Leagues that once opposed the scalping of tickets have done deals with Ticketmaster, StubHub and other online ticket marketplaces in the name of convenience and security for fans. The leagues have leapfrogged Slingbox, a service that allows fans to watch out-of-market games, by selling cable TV and Internet packages that show every game of every team.

Embracing gambling is different, though, because it may erode the moral authority of leagues, according to Jodi Balsam, a professor at Brooklyn Law School and a former lawyer for the NFL The growth of the Internet has made sports gambling far easier and has forced the leagues to protect the integrity of their sports by, for instance, publishing injury reports.

But encouraging consumers to gamble is a slippery slope for the leagues, Balsam said, because it will be harder for them to prohibit players from gambling.

"There is a morality tale here because once you endorse legalized sports gambling, it's harder to police your own employees and players," she said. "It's the moral authority of losing control."

For now, the leagues do what they can to grab a share of fans' growing interest in sports through fantasy sports, which are defined for legal purposes as games of skill, not luck, like gambling.

Major League Baseball has a partnership with DraftKings, which offers a daily contest on MLB.com in which prizes include tickets to games rather than cash. Robert Bowman, the chief executive of Major League Baseball Advanced Media, the league's Internet company, said it was exploring a larger partnership with DraftKings and did not rule out the possibility of cash tournaments or other formats in which money would be at stake.

The NFL's lobbyists, along with lobbyists from other professional leagues, successfully pushed to exempt fantasy sports from the Unlawful Internet Gambling Enforcement Act of 2006, which outlawed online poker and sports betting. The NFL also hosts season-long leagues on its website, provides fantasy analysis of players and winning strategies, and offers Fantasy Ultimate Experience Leagues, pay-to-enter contests that offer jerseys and memorabilia as prizes.

"We have spent a lot of time inside here and talking to other outside experts and have concluded these are games of skill and adhere to the federal law," Bowman said. "It keeps people interested in the games."

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THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *et al.*,	**Civil Action No. 3:14-cv-06450 (MAS)**
Plaintiffs,	**Honorable Michael A. Shipp**
v.	Document Electronically Filed
CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, *et al.*	
Defendants.	

STATEMENT OF INTEREST OF THE UNITED STATES

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INTRODUCTION

The United States of America, pursuant to 28 U.S.C. § 517, files this Statement of Interest with respect to the preliminary injunction motion presently before the Court.[1] The United States has an interest in the proper application of the Professional and Amateur Sports Wagering Act ("PASPA"). *See* 28 U.S.C. §§ 3701-04. And with respect to the pending proceedings, the United States submits that provisions of New Jersey law in effect following enactment of the 2014 Sports Wagering Act still conflict with PASPA's prohibitions. *See* 28 U.S.C. § 3702(1). In addition, the United States submits that sports wagering at Monmouth Park, which would be pursuant to state law, would violate PASPA. *See* 28 U.S.C. § 3702(2).

STATUTORY BACKGROUND

Enacted in 1992, PASPA sought to stop the spread of state-sanctioned sports gambling and to maintain the integrity of professional and amateur sports. *See* S. Rep. No. 102-248, at 4 (Nov. 26, 1991). Toward that end, PASPA contains two categories of prohibitions regarding any form of state-sanctioned sports wagering, which is defined to include "a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use

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[1] 28 U.S.C. § 517 provides that "any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States . . . ."

of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." 28 U.S.C. § 3702. The first category of prohibitions applies to governmental entities, including States, and it makes it unlawful for those entities, "to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. *See id.* § 3702(1). The second category of prohibitions applies to persons, making it unlawful for a person "to sponsor, operate, advertise, or promote" sports wagering pursuant to the law or compact of a governmental entity. *See id.* § 3702(2). To enforce these prohibitions, PASPA permits civil enforcement actions to be initiated by either the Attorney General of the United States or by any sports organization "whose competitive game is alleged to be the basis of such violation." *See id.* § 3703.[2]

FACTUAL BACKGROUND

New Jersey's recent efforts to establish state-sponsored sports gambling arise out of a 2011 statewide ballot initiative that amended the New Jersey Constitution with respect to sports wagering. The New Jersey Constitution contains a general prohibition of all gambling, subject to exceptions. *See* N.J. Const. art. IV, § VII, ¶ 2. Consistent with that constitutional limitation, New Jersey also has a general

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[2] PASPA contains exceptions to its prohibitions, see 28 U.S.C. § 3704(1)(a)-(d), and on the basis of those exceptions, four States have engaged in varying degrees of sports wagering. Those exceptions are not relevant here.

* * *

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statutory prohibition that "[a]ll wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event, shall be unlawful." N.J. Stat. Ann. § 2A:40-1. New Jersey also criminalizes the promotion of gambling. *See id.* § 2C:37-1. Through the 2011 amendments, however, New Jersey altered its Constitution to create exceptions for certain sports wagering at casinos and racetracks, by enabling the Legislature "to authorize by law" sports wagering at those locations. *See* N.J. Const. art. IV, § VII, ¶¶ 2(D), (F). In light of the amendments, New Jersey has undertaken three recent efforts to permit sports wagering at casinos and racetracks.

The first effort was the enactment of the 2012 Sports Wagering Act. *See* 2011 N.J. Sess. Law Serv. Ch. 231 (Jan. 17, 2012). That act created an exception to the pre-existing statutory prohibitions to permit sports wagering in casinos and racetracks. Five sports organizations[3] sued to enjoin the operation of the 2012 Sports Wagering Act and to prevent New Jersey from violating PASPA. As "a purported authorization by law of sports wagering," the 2012 Act was "precisely what PASPA says states may not do." *See NCAA v. Governor of New Jersey*, 730 F.3d 208, 227 (3d Cir. 2013). Rather than dispute PASPA's applicability to

[3] Those sports organizations consisted of one amateur sports league, the National Collegiate Athletic Association, and four professional sports leagues, the National Basketball Association, the National Football League, the National Hockey League, and the Office of the Commissioner of Baseball.

the 2012 Sports Wagering Act, New Jersey and the defendant-intervenors in that case[4] instead challenged PASPA's constitutionality in several respects. Specifically, they argued that PASPA violated the anti-commandeering doctrine under the Tenth Amendment, equal sovereignty principles, and the Commerce Clause. The United States intervened in the litigation to defend the constitutionality of PASPA.

Each of those constitutional challenges failed. This Court upheld PASPA's constitutionality and permanently enjoined state officials from violating PASPA. *See NCAA v. Christie*, 926 F. Supp. 2d 551, 579 (D.N.J. 2013). On appeal, the Third Circuit upheld PASPA's constitutionality and affirmed the District Court's decision. *See NCAA v. Governor of New Jersey*, 730 F.3d at 240-41. The Supreme Court denied petitions for writs of certiorari to review the Third Circuit's decision. *See Christie v. NCAA*, 134 S. Ct. 2866 (June 23, 2014).

Following the denial of the certiorari petitions, New Jersey commenced its second effort to implement sports wagering through Law Enforcement Directive 2014-1 (the "Directive"), issued on September 8, 2014, by the Acting Attorney General for New Jersey. In the Directive, the New Jersey Attorney General expressed his opinion that "PASPA does not prohibit States from repealing state-law prohibitions on sports wagering."

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[4] Those intervening defendants were the New Jersey Thoroughbred Horsemen's Association, Inc., New Jersey State Senator Stephen M. Sweeney, and New Jersey Assembly Speaker Sheila Y. Oliver.

Directive at 4. Consistent with that legal perspective, the New Jersey Attorney General directed law enforcement and prosecuting agencies to abide by that interpretation to ensure that casinos and racetracks could operate sports pools. *See id.* at 5.

On the same date as the issuance of the Directive, state officials filed a motion requesting that the District Court make clear that the Directive did not violate the permanent injunction. The United States and the sports organizations opposed that motion and explained that the Directive rested on a flawed theory of severability and that it violated PASPA's authorization-by-law and licensing prohibitions. In the course of briefing those issues, casinos and racetracks in New Jersey agreed to a moratorium whereby no sports wagering would take place until after October 25, 2014. The New Jersey defendants requested two extensions of time to reply to the oppositions to its motion, with the final due date being October 17, 2014. Instead of replying to the motions on that date, New Jersey withdrew its motion based on the enactment of the 2014 Sports Wagering Act earlier that day.

The 2014 Act is New Jersey's third effort to permit sports wagering at its racetracks and casinos, and it is the subject of this action. The 2014 Act purports to repeal any statutory or regulatory provisions of New Jersey law with respect to sports wagering at casinos and racetracks. To that end, the 2014 Act repeals the 2012 Sports Wagering Act in its entirety (thus mooting the Directive) and also eliminates any statutory or regulatory provisions permitting any

state agency to license, authorize, permit, or otherwise take action to allow any person to engage in sports wagering to the extent that those laws apply to casinos and racetracks. The 2014 Act also eliminates prohibitions on sports wagering at casinos and racetracks by repealing the statutes that make sports wagering unlawful and criminal to the extent that those statutes apply to wagering at casinos and racetracks. In sum, the 2014 Act seeks to repeal any statute, regulation, or rule – either a permission or a prohibition – regarding sports wagering at casinos and racetracks, leaving New Jersey with no statutory or regulatory provisions whatsoever in that regard. However, New Jersey's long-standing prohibitions on sports wagering would remain in full effect everywhere else in the State. And New Jersey's regime for licensing casinos and racetracks – the very entities that would be permitted to conduct gaming operations under the State's plan – likewise remains in effect. In reliance on the 2014 Act, one racetrack, Monmouth Park, sought to commence sports wagering operations on October 26, 2014 (the day after the moratorium's expiration).

Those developments prompted the sports organizations to file this action against New Jersey, Monmouth Park, and the New Jersey Sports and Exhibition Authority, primarily on the ground that the 2014 Act violates PASPA. As part of that litigation, the sports organizations filed a motion for a temporary restraining order ("TRO") and a preliminary injunction to prevent the commencement of sports wagering. The parties briefed the application for a TRO between October 21 and October 24, 2014. On October 25, 2014, the Court granted the requested TRO, which

prevented the commencement of any sports wagering at Monmouth Park. As part of its order, the Court required the sports organizations to post a bond of $3.4 million (which the sports organizations have done), and the Court set a briefing schedule for the preliminary injunction determination before the TRO expires on November 21, 2014.

STANDARD OF REVIEW

In the absence of statutory guidance from Congress, a court typically evaluates a request for injunctive relief through consideration of four factors:

1. whether the movant has shown a reasonable probability of success on the merits;

2. whether the movant will be irreparably injured by denial of the relief;

3. whether granting preliminary relief will result in even greater harm to the nonmoving party; and

4. whether granting preliminary relief will be in the public interest.

Crissman v. Dover Downs Entm't Inc., 239 F.3d 357, 364 (3d Cir. 2001); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Section 3703 of PASPA, however, is a statutory injunction provision. Through that section, Congress expressly permitted a civil action to enjoin PASPA violations:

> A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.

28 U.S.C. § 3703. Under that formulation, Congress already has determined that an injunction is appropriate for violations of PASPA. Rather than permit any injured person to sue for a violation of PASPA, Congress specified only two entities that may sue for such an injunction (the United States and sports organizations whose competitive games are alleged to be the basis of a PASPA violation). When one of those two entities seeks an injunction for a violation of PASPA, it need show only a reasonable likelihood of a future violation of one of PASPA's prohibitions, and need not make an independent showing of injury. *See, e.g.*, *United States v. Richlyn Labs., Inc.*, 827 F. Supp. 1145, 1150 (E.D. Pa. 1992); *United States v. Toys "R" Us*, 754 F. Supp. 1050, 1053 (D.N.J. 1991); *RezMed Recovery Care Ctrs. v. Twp. of Willistown*, 36 F. Supp. 2d 676, 687 (E.D. Pa. 1999).

This is so because PASPA reflects a considered congressional judgment that state sponsored sports wagering should not occur – as reflected in the clear language of § 3702 and the absence of any applicable exception to Congress's ban. PASPA creates a situation similar to *TVA v. Hill*, 437 U.S. 153, 193-195 (1978), in which it was established that courts should not second-guess Congress's considered judgment by declining to enforce the statute. Also, PASPA does not

provide a general, open-ended grant of authority to a court to grant injunctive relief in a wide range of situations. It is focused on specifically identified conduct, which reinforces the view that Congress has balanced the competing considerations in this context. Furthermore, PASPA presents a situation in which injunctive relief is the only remedy – there are no criminal sanctions or civil penalties. *See United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 496-497 (2001). That Congress also gave sports organizations a right to sue further substantiates the conclusion that the perceived threat to the integrity of their games was a sufficient basis for relief. Finally, this is not a situation where there are countervailing public interests deriving from other federal statutes or programs of substantial importance, such as the Navy training at issue in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 21-31 (2008). Instead, through PASPA, Congress sought to stop the spread of state-sanctioned sports gambling and to maintain the integrity of professional and amateur sports. *See* S. Rep. No. 102—248, at 4 (1991). Given PASPA's substantive and injunctive provisions, then, a court in equity cannot "ignore the judgment of Congress, deliberately expressed in legislation." *Va. Ry. Co. v. Sys. Fed. No. 40*, 300 U.S. 515, 551 (1937).

DISCUSSION

The United States submits that New Jersey's regime in effect in the wake of the 2014 Sports Wagering Act continues to conflict with PASPA, and that Monmouth Park's effort to permit sports betting pursuant to state law does so as well. Under these circumstances, and in light of the standard of review for

PASPA's statutory injunction provision, the requirements for an injunction under PASPA are satisfied.

I. THE 2014 SPORTS WAGERING ACT DOES NOT BRING NEW JERSEY LAW INTO COMPLIANCE WITH PASPA

Defendants contend that due to the 2014 Act, sports wagering at casinos and racetracks in New Jersey would be permitted under PASPA. That argument is based on the view that any type of legal regime in effect following a partial repeal of New Jersey's statutory sports wagering prohibitions would be permissible under PASPA. *See* 2014 Act, Statement. But that assumption is incorrect: although PASPA does not require New Jersey to maintain any sports wagering prohibition, it nonetheless remains unlawful under PASPA for New Jersey to license sports wagering or authorize it by law. *See* 28 U.S.C. § 3702(2); *NCAA v. Governor of New Jersey*, 730 F.3d at 232 (explaining that PASPA prohibits "the issuances of gambling 'license[s]' or the affirmative 'authorization *by law*' of gambling schemes" (alternations and emphasis in original)). Here, notwithstanding the 2014 Sports Wagering Act's repeal of aspects of New Jersey law on sports betting, the Act leaves in place licensing requirements that effectively permit sports wagering and constitutes an impermissible authorization by law.

Most fundamentally, the 2014 Act fails to bring New Jersey law into compliance with PASPA's licensing prohibition. The 2014 Sports Wagering Act repeals New Jersey's prohibitions on sports wagering as

applied to casinos and racetracks. But under New Jersey law, casinos and racetracks must be licensed. *See, e.g.*, N.J. Const. art. IV, § VII, ¶ 2(D), "It shall be lawful for the Legislature to authorize by law the establishment and operation, *under regulation and control by the State*, of gambling houses or casinos within the boundaries, as heretofore established, of the city of Atlantic City, county of Atlantic, and *to license* and tax such operations and equipment used in connection therewith." (emphasis added); N.J. Stat. Ann. § 5:12-96 (requiring a license for casinos); N.J. Stat. Ann. § 5:5-50 (requiring a permit for racetracks with wagering on horse racing). By lifting its prohibition on sports wagering for only those locations – casinos and racetracks – which must be licensed, the 2014 Act does not alter the result that sports wagering is confined to entities that have received a license. Yet such a licensing provision for sports wagering is plainly prohibited by PASPA. *See* 28 U.S.C. § 3702(1).

In addition, assuming that the 2014 Act is permissible under the New Jersey Constitution, it would also run afoul of PASPA's prohibition against an authorization by law of sports wagering. The New Jersey Constitution prohibits all gambling, subject to exceptions. *See* N.J. Const. art. IV, § VII, ¶ 2. That general prohibition has exceptions that allow sports gambling at casinos and racetracks when *authorized by law* by the Legislature. *See* N.J. Const. art. IV, § VII, ¶¶ 2(D), (F). Under the ordinary meaning of the term "authorize by law" in the New Jersey Constitution, gambling

is legal only if expressly permitted by the Legislature.[5] *See NCAA v. Governor of New Jersey*, 730 F.3d at 232. Accordingly, if the 2014 Act allows sports wagering at licensed casinos and racetracks through anything other than an express permission, then it would apparently violate the New Jersey Constitution, but on that question of state law, the United States does not have a direct interest. Rather, the United States' interest arises if the 2014 Act is interpreted as an authorization by law, *i.e.*, an express permission for sports wagering at licensed casinos and racetracks under state law.[6] In that instance, the United States' interests are implicated because PASPA prohibits the authorization by law of sports wagering. *See* 28 U.S.C. § 3702(1). Accordingly, to the extent that it is consistent with the New Jersey Constitution and amounts to an authorization by law (an express permission), the 2014 Act is prohibited by PASPA.

Finally, in addition to its prohibitions pertaining to governmental entities, PASPA prohibits any person from conducting a sports wagering operation pursuant to the law or compact of any governmental entity. *See* 28 U.S.C. § 3702(2). As applied here, Monmouth Park seeks to operate a sports pool pursuant to

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[5] The Third Circuit previously viewed the term "authorize by law" consistently as it is used in the New Jersey Constitution and in PASPA by analyzing both contexts and concluding that "authorize by law" is different than "authorize." *NCAA v. Governor of New Jersey*, 730 F.3d at 232.

[6] Under New Jersey law, if legislation can be interpreted consistently with the State Constitution, it should be given that meaning. *See Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 457 (N.J. 2007); *State v. Miller*, 790 A.2d 144, 153-54 (N.J. 2002).

state law as in effect following the enactment of the 2014 Sports Wagering Act, which as explained above, constitutes a licensing of sports wagering within the meaning of PASPA. Because any sports wagering at Monmouth Park is pursuant to state law, it thus is prohibited by
§ 3702(2).

II. THE UNITED STATES' PREVIOUSLY EXPRESSED VIEWS REGARDING PASPA DO NOT MEAN THAT NEW JERSEY LAW IS PRESENTLY COMPLIANT WITH PASPA

Defendants mistakenly rely on out-of-context statements by the United States in support of their position with respect to effect of the 2014 Sports Wagering Act. *See, e.g.*, Mem. in Opp. by New Jersey Defs., ECF No. 44 at 4, 7, 13 n.2 (Nov. 3, 2014); Mem. in Opp. by NJTHA, ECF No. 42 at 12-14 (Nov. 3, 2014). In the prior litigation regarding the 2012 Sports Wagering Act, the United States made clear that PASPA does not require the maintenance of sports wagering prohibitions and that "the bare repeal" of New Jersey's sports wagering prohibitions would not offend the authorize-by-law prohibition in PASPA. *See NCAA v. Christie*, Nos. 13-1713, -1714, -1715, Br. for Appellee the United States at 30
(3d Cir. June 7, 2013) (copy available at ECF No. 21-5).[7] But those statements must be read in their full

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[7] Other related statements by the United States include the following:

context, as well as in the full context of New Jersey law. In making those statements, the United States did not advocate that *any* partial repeal of statutory prohibitions on sports betting would result in a state legal regime that would be consistent with PASPA. Rather, following any repeal, it would be necessary to evaluate *all* New Jersey law – including the constitutional requirements – to determine whether New Jersey continues to license or authorize by law sports betting. Thus, the United States was simply refuting the contention that PASPA required New Jersey to maintain a complete ban on sports wagering. That, of course, does not mean that PASPA permits New Jersey to license or authorize by law sports wagering

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- At page 11 of the United States' Opposition to Certiorari in the Supreme Court: "PASPA does not even obligate New Jersey to leave in place the state law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part." *Christie v. NCAA*, Nos. 13-967, -979, & -980, Br. for the United States at 11 (May 2014) (available at http://www.justice.gov/sites/default/files/osg/briefs/2013/01/01/2013-0967.resp.pdf.)

- On page 28 of the appellate brief for the United States in the Third Circuit: "Nothing in the statute requires New Jersey to maintain or enforce its sports wagering prohibitions." *NCAA v. Governor of New Jersey*, Nos. 13-1713, -1714, -1715, Br. for Appellee the United States at 28 (3d Cir. June 7, 2013) (copy available at ECF No. 21-6).

- At pages 68 and 69 of the transcript of the United States' oral argument in the Third Circuit: "It is up to the State of New Jersey to determine for itself the extent to which it will or will not enforce the law." *NCAA v. Governor of New Jersey*, Nos. 13-1713, -1714, -1715, Oral Argument Transcript at 68-69 (3d Cir. June 26, 2013) (copy available at ECF No. 21-5).

simply by effectuating those outcomes by making selective exceptions from existing laws with respect to casinos and racetracks. In short, the selective repeal of sports wagering prohibitions does not mean that the remaining provisions of state law comply with PASPA. That is particularly so here with respect to licensing, where even after the 2014 Act, sports betting is permitted under New Jersey law only at licensed locations.

CONCLUSION

For the foregoing reasons, the 2014 Sports Wagering Act does not remedy the pre-existing reasons why New Jersey law runs afoul of PASPA. Moreover, because sports wagering at Monmouth Park would be pursuant to state law, it is prohibited by PASPA.

November 19, 2014 Respectfully Submitted,

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November 20, 2014

BY ECF

Hon. Michael A. Shipp, U.S.D.J.
U.S. District Court for the District of New Jersey
Clarkson S. Fisher Building and U.S. Courthouse
402 East State Street
Trenton, NJ 08608

RE: National Collegiate Athletic Association, et al. v.
Christopher J. Christie, et al.,
C.A. No. 3:14-cv-6450 (MAS)(LHG)

Dear Judge Shipp:

We represent Defendant New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA") in the above-referenced action. Yesterday, Your Honor entered a Text Order advising the parties that "the Court shall consolidate Plaintiffs' application for a preliminary injunction with a decision on the merits through summary judgment" (D.E. 56). On behalf of

the NJTHA, for the reasons set forth in our letter to Your Honor, dated November 17, 2014 (D.E. 53), we respectfully object to the consolidation referred to in Your Honor's Text Order.

In light of the consolidation referred to in Your Honor's Text Order, we hereby incorporate the Statements of Undisputed Material Facts submitted by the State Defendants (D.E. 52-1) and Defendant NJSEA (D.E. 60). We also incorporate by reference the NJTHA's Statement of Undisputed Facts that was filed in *Christie I* (D.E. 110-1 in 3:12-cv-04947). Finally, we incorporate by reference the factual statements contained in the certifications of Dennis A. Drazin (D.E. 21-11), Michael Musto (D.E. 21-9), Robert J. Kulina (D.E. 21-10), and Ronald J. Riccio (D.E. 21-1, 42-1, 53-1) submitted by the NJTHA in this action.

Respectfully submitted,

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP

/s/ Ronald J. Riccio
Ronald J. Riccio

cc: Counsel of Record

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	Civil Action No. 14-6450 (MAS) (LHG)
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	Civil Action No. 12-4947 (MAS) (LHG) **ORDER**

THIS MATTER having been brought before the Court by McCarter & English, LLP, Skadden, Arps, Slate, Meagher & Flom LLP, and Bancroft PLLC, attorneys for Plaintiffs National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the Commissioner of Baseball, doing business as

Major League Baseball (collectively "Plaintiffs"), seeking a Preliminary Injunction, and the Court having considered parties' submissions and arguments; and the Court having consolidated Plaintiff's application for a preliminary injunction with a decision on the merits through a *sua sponte* summary judgment decision; and for the reasons stated in the Opinion filed on this date; and for other good cause shown,

IT IS on this 21st day of November, 2014, **ORDERED** that:

1. Plaintiffs' Application for a Preliminary Injunction (12-4947, ECF No. 174; 14- 6450, ECF No. 12) is **TERMINATED** as moot.

2. Summary Judgment is **GRANTED** to Plaintiffs on Count One of the Complaint (14-6450, ECF No. 1).

3. Counts Two, Three, and Four of the Complaint (14-6450, ECF No. 1) are **DISMISSED**.

4. Plaintiffs' request for a permanent injunction is **GRANTED**, and the State Defendants are permanently enjoined from violating the Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701-3704, by giving operation or effect to N.J. Stat. Ann. §§ 5:12A-7 to -9 (2014) in its entirety.

s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

Nos. 14-4546, 14-4568, 14-4569

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,
Plaintiffs-Appellees v.

GOVERNOR OF THE STATE OF NEW JERSEY et al.
Defendants-Appellants

On Appeal from the United States District Court for the District of New Jersey

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States submits this brief as amicus curiae to address the proper construction and application of the Professional and Amateur Sports Protection Act ("PASPA" 28 U.S.C. §§ 3701-04, in the context of this case. The United States has an interest in ensuring that PASPA is construed and applied in a manner that is consistent with Congress's goal of preventing the expansion of state-sanctioned sports gambling. In *NCAA v. Governor of New Jersey*, 730 F.3d 208, 227 (3d Cir. 2013) ("*Christie I*"), this Court held that New Jersey

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recently passed laws relating to sports gambling conflicted with PASPA's prohibition against "sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authoriz[ing] by law or compact" sports gambling. For the reasons set forth below, the United States believes that the 2014 New Jersey legislation that amended New Jersey's existing laws regarding sports gambling does not eliminate the conflict between New Jersey law and PASPA.

STATEMENT OF ISSUES

Whether the laws of New Jersey relating to sports gambling, as amended by New Jersey Senate Bill 2460 (the "2014 Act"), conflict with PASPA's prohibition against "licensing" sports gambling and "authorizing" sports gambling "by law."

STATEMENT OF THE CASE

1. Congress enacted PASPA in 1992 to stop the spread of state-sanctioned sports gambling and to maintain the integrity of professional and amateur sports. *See* S. Rep. No. 102-248, at 4 (Nov. 26, 1991). Toward that end, PASPA generally prohibits state-sanctioned sports wagering, which is defined to include any "betting, gambling, or wagering scheme based, directly or indirectly ... on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." 28 U.S.C. § 3702. Under PASPA, "governmental entities," including states, may not "sponsor, operate, ad-

vertise, promote, license, or authorize by law or compact" sports wagering. *See id.* § 3702(1). In addition, PASPA makes it unlawful for persons "to sponsor, operate, advertise, or promote" sports wagering pursuant to the law or compact of a governmental entity. *See id.* § 3702(2). PASPA's prohibitions may be enforced through civil actions for injunctive relief brought by either the Attorney General of the United States or by any sports organization "whose competitive game is alleged to be the basis of such violation." *See id.* § 3703.

2. Since 2012, the New Jersey legislature has been seeking to introduce sports gambling at the state's casinos and racetracks. The legislation that gave rise to the present suit, New Jersey Senate Bill 2460 (the "2014 Act"), is the latest in a series of legislative enactments designed to accomplish that goal.

Prior to 2012, New Jersey prohibited wagering on all sporting events other than horse racing, as part of the state's general prohibitions on gambling. *See* N.J. Const. art. IV, § VII (with specified exceptions, "[n]o gambling of any kind shall be authorized by the Legislature" without the approval of voters); N.J. Stat. Ann. § 2A:40-1 ("[a]ll wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event, shall be unlawful"); *id.* § 2C:37-1 (prohibiting promotion of gambling). However, following a statewide ballot initiative in 2011, the New Jersey Constitution was amended to create an exception for sports wagering. Using the same language as PASPA, the constitutional amendment empowered the New Jersey Legislature to "authorize by

law" sports wagering at casinos and racetracks. *See* N.J. Const. art. IV, § VII, ¶¶ 2(D), (F). The power conferred upon the legislature is qualified in one respect: the legislature may not authorize wagering "on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place." *Id.*

Acting pursuant to that constitutional amendment, New Jersey enacted the 2012 Sports Wagering Act (the "2012 Act"), which provided for regulated sports wagering at the state's casinos and racetracks. *See* 2011 N.J. Sess. Law Serv. Ch. 231 (Jan. 17, 2012); *Christie I*, 730 F.3d at 217. The nation's principal professional sports leagues and the NCAA sued state officials in the District of New Jersey to enjoin the operation of the 2012 Act. *See NCAA v. Christie*, 926 F. Supp. 2d 551, 579 (D.N.J. 2013). In that litigation, the state defendants did not dispute that the 2012 legislation conflicted with PASPA; instead they attacked PASPA's constitutionality. In response, the United States intervened to defend the constitutionality of PASPA.

The district court rejected each of the constitutional challenges to PASPA and enjoined the defendants from implementing the 2012 Act. On appeal, this Court affirmed the district court's injunction. The Court explained that as "a purported authorization by law of sports wagering," the 2012 Act was "precisely what PASPA says the states may not do." *Christie I*, 730 F.3d at 227; *see also id.* at 240-41. The Court rejected the defendants' constitutional claims, including

their claim that PASPA violates the anti-commandeering principles of the Tenth Amendment. In the course of its Tenth Amendment analysis, the Court explained that while PASPA precludes the states from "authorizing [sports gambling] by law," PASPA does not preclude a state from repealing its existing prohibitions against sports gambling. *See id.* at 232-33. Following this Court's decision, the Supreme Court denied the defendants' petitions for a writ of certiorari in June 2014. *See Christie v. NCAA*, 134 S. Ct. 2866 (2014).

3. Immediately after the Supreme Court denied review of this Court's decision, the New Jersey Legislature passed Senate Bill 2250, which provided that "[a]ll prohibitions ... against wagering on the results of any professional, college, or amateur sport or athletic event, are partially repealed to the extent they would apply to such wagering at casinos or gambling houses in Atlantic City or at current running and harness horse racetracks in this State." N.J. S. No. 2250 (June 23, 2014). The Governor of New Jersey vetoed that bill. In his veto statement, he explained that the bill, which "partially deregulates betting at casinos and racetracks," was "an effort to sidestep federal law." Christie Statement at 2 (available online at http://www.njleg.state.nj.us/2014/Bills/S2500/2250_V1.HTM). Because he was unable to ignore federal law, the Governor stated, "I cannot sign this bill." *Id.*

On October 17, 2014, New Jersey enacted Senate Bill 2460 (the "2014 Act"), which is the subject of this litigation. The 2014 Act repeals the 2012 Act that was invalidated by this Court in *Christie I*. 2014 Act § 5.

At the same time, the 2014 Act partially repeals the provisions of the New Jersey statutes that prohibit gambling activities and the provisions that regulate gambling at racetracks and casinos. *Id.* § 1. In addition, the 2014 Act partially repeals "any rules and regulations that may require or authorize any State Agency to license, authorize, permit, or otherwise take action to allow any person to engage" in sports gambling. *Id.*

The 2014 Act repeals the foregoing statutory provisions and regulations "to the extent [that] they apply ... at a casino or gambling house ... or a running or harness horse racetrack" to "the placement or acceptance of wagers [on sporting events] ... by [adults who are] situated at such location," or to "the operation of a wagering pool that accepts such wagers from [adults who are] situated at such location." 2014 Act § 1. As a result, casino and racetrack operators are now permitted to conduct sports gambling operations on their premises. Other persons may conduct sports gambling at casinos and racetracks only if "the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or operation." *Id.* However, New Jersey's long-standing prohibitions on sports wagering remain in effect everywhere except casinos and racetracks, and continue to prohibit sports gambling by persons, other than the operator, who have not obtained the operator's consent. In addition, New Jersey's laws requiring the licensing of the operators of casinos and racetracks–the entities that are permitted to conduct gaming operations under the 2014 Act, and whose consent is required for any other persons to conduct sports gambling operations at those locations–likewise remain in

effect. *See*, e.g., N.J. Const. art. IV, § VII, ¶ 2(D), ("It shall be lawful for the Legislature to authorize by law the establishment and operation, *under regulation and control by the State*, of gambling houses or casinos within the boundaries, as heretofore established, of the city of Atlantic City, county of Atlantic, and to license and tax such operations and equipment used in connection therewith." (emphasis added)); N.J. Stat. Ann. § 5:12-96 (requiring a license for casinos); N.J. Stat. Ann. § 5:5-50 (requiring a permit for racetracks with wagering on horse racing).

4. Before any sports wagering commenced under the authority of the 2014 Act, the sports organizations that litigated *Christie I* initiated a civil action under PASPA to enjoin the 2014 Act and persons seeking to engage in sports wagering pursuant to the 2014 Act. In November 2014, the district court entered summary judgment in favor of the sports organizations and issued a permanent injunction against the implementation of the 2014 Act.

The district court held that the 2014 Act is preempted by PASPA. *See* Op. at 15 (A19). The court acknowledged that, as construed in *Christie I*, PASPA does not bar a state from repealing its laws against sports gambling. However, the court interpreted *Christie I* to confine a state to repealing its anti-sports gambling laws in their entirety. *See id.* at 18-20 (A22-24). The court held that a partial repeal, in contrast to a complete repeal, amounts to authorizing by law the gambling that comes within the scope of the repealing legislation, and thereby runs afoul of the prohibition on "authorizing [sports gambling] by law" in

28 U.S.C. § 3702(1). *See id.* at 22-27 (A26-31). As interpreted by the district court, PASPA leaves a state with a binary choice between maintaining its existing prohibitions on sports wagering in full or to repealing them completely. *See id.* at 18-20 (A22-24). Because the 2014 Act leaves the state's general prohibitions against sports gambling intact except insofar as the Act repeals them with respect to casinos and racetracks, the court held that it is preempted by PASPA. *See id.* at 29 (A31).

SUMMARY OF THE ARGUMENT

Although the 2014 Act seeks to take advantage of this Court's holding in *Christie I* that PASPA does not prohibit a state from repealing its laws against sports gambling, the Act fails to bring New Jersey law into conformity with PASPA. As modified by the 2014 Act, New Jersey law violates two of PASPA's prohibitions: the prohibition on licensing sports gambling and the prohibition on authorizing sports gambling by law.

The licensing prohibition is transgressed because the 2014 Act permits sports wagering only at facilities that are licensed to conduct gambling–the casinos of Atlantic City and the state's race tracks. Framing the 2014 Act in terms of venues rather than entities does not alter the result under PASPA when the only persons who may conduct sports betting at those locations are the licensed operators of the casinos and racetracks and persons whom they permit to act in their stead.

New Jersey law also conflicts with PASPA's "authorize by law" prohibition. The United States does not share the district court's view that anything short of complete repeal of a state's prohibitions on sports

gambling constitutes *ipso facto* authorization by law. But it does not follow that a state may insulate every change in its sports betting laws from the operation of PASPA simply by casting the change in the language of repeal. In this case, New Jersey is effectively authorizing sports betting by law by structuring its "partial repeal" to encourage sports betting at preferred venues as a tool of state economic development. Moreover, because the New Jersey Constitution permits sports wagering only if the legislature "authorize[s] by law" the wagering, and because PASPA preempts state sports gambling legislation that "authorizes by law," New Jersey cannot repeal its restrictions on sports betting in a manner consistent with the state Constitution without running afoul of PASPA.

ARGUMENT

THE 2014 ACT DOES NOT ELIMINATE THE CONFLICT BETWEEN NEW JERSEY'S SPORTS GAMBLING LAWS AND PASPA

I. New Jersey Is Engaged In The Licensing Of Sports Gambling

Prior to the enactment of the 2014 Act, this Court held in *Christie I* that New Jersey's laws relating to sports gambling conflicted with PASPA. The central question presented by this appeal is whether the 2014 Act eliminates that conflict. In the view of the United States, it does not. Although PASPA permits states to repeal prohibitions on sports gambling, it does not permit them to engage in the licensing of sports gambling activities. And New Jersey law, as revised by

the 2014 Act, operates as a licensing scheme for sports gambling.

The 2014 Act establishes a licensing requirement for sports wagering by confining the repeal of the state's laws against sports gambling to licensed gambling facilities. S. 2460, § 1. The 2014 Act repeals New Jersey's prohibitions on sports wagering only "to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State ..." *Id.* Under New Jersey law, the operators of casinos and racetracks must hold state gambling licenses. *See*, e.g., N.J. Const. art. IV, § VII, ¶ 2(D), ("It shall be lawful for the Legislature to authorize by law the establishment and operation, under regulation and control by the State, of gambling houses or casinos within the boundaries, as heretofore established, of the city of Atlantic City, county of Atlantic, and to license and tax such operations and equipment used in connection therewith." (emphasis added)); N.J. Stat. Ann. § 5:12-96 (requiring a license for casinos); N.J. Stat. Ann. § 5:5-50 (requiring a permit for racetracks with wagering on horse racing). By confining the operation of the 2014 Act to facilities that are operated pursuant to gambling licenses, New Jersey is engaged in licensing under the guise of repeal. New Jersey law thus conflicts with the prohibition on "licensing" sports gambling in 28 U.S.C. § 3702(1).

Appellants argue that the New Jersey law does not run afoul of PASPA's licensing prohibition because the licenses held by casinos and racetracks are not for sports wagering but are for either casino gambling or

horseracing. *See* N.J. Br. at 43-44. That is a distinction without a difference. When a state issues a license to engage in particular activities, then enacts a law that allows the license holder to engage in additional (and closely related) activities, it has done nothing more than legislatively enlarge the terms of the existing license. That is what New Jersey has done here: the 2014 Act effectively revises the licenses held by the state's casino and racetrack operators to allow them to take bets on sporting events as well as games of chance and horse races.

Appellants also argue that there is no violation of PASPA's licensing prohibition because the casino and horseracing licenses were issued to entities (casino and racetrack operators), while the 2014 Act applies to venues (the casinos and racetrack sites). *See* N.J. Br. at 44-45. But PASPA establishes a general bar on the licensing of "[sports] betting, gambling, or wagering scheme[s]"; that language does not draw any distinction between licensing entities and licensing venues.

Even if PASPA's licensing prohibition were understood to apply only to the licensing of entities, New Jersey law after the 2014 Act would still violate PASPA's licensing prohibition. As noted above, New Jersey law continues to prohibit persons other than a licensed casino or racetrack operator from conducting wagering on sporting events on the premises of casinos and racetracks unless the facility's licensed operator gives them permission to do so. *See* pp. 6-7 *supra*. That need for permission from a license holder is tantamount to a license requirement. Permitting other

parties to conduct a licensed activity with the permission (and only with the permission) of a license holder is no different from allowing the license holder to transfer or assign the license. A transfer or assignment of a license does not alter the licensed character of the activity. Thus, even under a more rigid reading of PASPA's licensing prohibition, New Jersey is still engaged in the licensing of sports gambling following the 2014 Act.

II. New Jersey Is Authorizing Sports Gambling By Law

As noted above, the district court held that the 2014 Law conflicts with another component of PASPA, the prohibition on "authoriz[ing] by law" sports gambling. In applying the statutory distinction between "authorizing by law," which is prohibited, and repealing existing prohibitions on sports gambling, which PASPA permits a state to do, the district court interpreted PASPA to present states with an all-or-nothing choice between leaving existing restrictions undisturbed and repealing them *in toto*. Because the 2014 Act effects only a limited repeal of the state's laws against sports gambling, the district court concluded that New Jersey was engaged in *pro tanto* authorization of the sports betting activities that are the subject of the repeal.

The United States does not believe that 28 U.S.C. § 3702(1) is properly construed to limit a state's alternatives in this fashion. In its opposition to the petitions for certiorari in *Christie I*, the United States advised the Supreme Court that New Jersey is "free [under PASPA] to repeal [its] prohibitions [on sports

gambling] in whole or in part." *Christie v. NCAA*, Nos. 13-967, 13-979 & 13-980, Br. for United States in Opp. 11 (May 2014) (available at http://www.justice.gov/sites/default/files/osg/briefs/2013/01/01/2013-0967.resp.pdf.) As indicated by that submission, we do not understand PASPA to draw a categorical distinction between complete and partial repeals. Instead PASPA prohibits six specific actions with respect to sports wagering: sponsoring, operating, advertising, promoting, licensing, or authorizing by law or compact. *See* 28 U.S.C. § 3702(1). As long as a state is not engaged in any of these activities, it may repeal in whole or in part its sports wagering prohibitions. The district court erred in thinking that anything short of a global repeal is *ipso facto* "authorization by law" of whatever falls within the scope of the repeal.[1]

It does not follow, however, that *every* partial repeal of a state's prior sports betting prohibitions will

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[1] The district court mistakenly read this Court's decision in *Christie I* to have held that PASPA presents states with an all-or-nothing choice between full preservation of existing anti-sports gambling laws and complete repeal. *See* Op. 18-20 (A18-A20). While certain language in the Court's opinion might be read as having contemplated a binary choice between maintaining sports wagering prohibitions in whole and repealing them completely, other language in the opinion points in the opposite direction, suggesting greater room for state policy choices. *See* 730 F.3d at 233 ("it is left up to each state to decide ... what the exact contours of the prohibition will be"); id. ("both choices leave much room for the states to make their own policy"). Given the lack of clarity on this point in the opinion, and given that the permissibility of partial repeals of sports gambling prohibitions was not actually before the Court in *Christie I*, the Court's decision cannot fairly be taken to have resolved that issue.

automatically satisfy PASPA, or that a state legislature is free to enact any laws that it wishes regarding sports gambling as long as it takes care to frame them as "partial repeals" of existing prohibitions. For example, if a state repeals its prohibitions on sports gambling only for chosen persons or entities, it may run afoul of PASPA's licensing prohibition, as New Jersey has done in this case. And other legislative efforts to encourage sports gambling may result in "authorization by law" even when cast in the form of a partial repeal. If the rule were otherwise, a state could circumvent the restrictions in 28 U.S.C. § 3702(1) at will simply by using the language of repeal to specify or leave intact only those sports gambling activities that it wishes to sponsor and promote.

In this case, the structure and scope of the 2014 Act suggest that New Jersey is engaged in precisely that: the authorization by law of sports gambling in the guise of repeal. Sports wagering is generally prohibited under the New Jersey Constitution and statutes. New Jersey has lifted those prohibitions for a small and preferred class of persons and venues–only casino and racetrack operators and those acting with their permission, and only in specified venues in Atlantic City and the state's racetracks. As the appellants argue, New Jersey regards this specific gambling activity as vital to the economic recovery of Atlantic City and the sustainability of the New Jersey equine industry. *See* NJ. Leg. Br., No. 14- 4546, at 9 ("Revitalization is especially critical now in Atlantic City, where the casino industry has experienced the worst year in its history, with four of the city's 12 casinos closing in 2014 and another rumored to close in 2015"); Horsemens' Br., No. 14-4569, at 3-7. Thus,

New Jersey has not chosen simply to withdraw existing restrictions on sports gambling; the 2014 Act seeks to encourage and promote specific sports gambling activities as an exercise in state economic development. By structuring an exception to New Jersey's general prohibition on sports wagering in this fashion, New Jersey has engaged in the affirmative authorization by law of the sports wagering covered by the 2014 Act.

We also note that, under the terms of the New Jersey Constitution, sports gambling is prohibited except insofar as it is "authorized by law" by the legislature. *See* N.J. Const. art. IV, § VII, ¶¶ 2(D), (F). Thus, the 2014 Act comes within the scope of the legislature's authority under the state Constitution only if it "authorizes by law" the sports gambling activities that it addresses. But if the 2014 Act *is* an "authorization by law" of sports wagering, then it violates PASPA, which prohibits "authorize[ing] by law" sports wagering. *See* 28 U.S.C. § 3702(1).[2] As a result, there appears to be no room for the 2014 Act to conform simultaneously to state and federal law.

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[2] There is no reason why the same language should be construed to have different meanings under PASPA and the state Constitution. Congress enacted PASPA in 1992, nearly twenty years before the 2011 amendment to the New Jersey Constitution regarding sports gambling. As a result, the drafters of the state constitutional amendment must be assumed to have been aware of the language of PASPA, including the "authorize by law" language in 28 U.S.C. § 3702(1). They were free to use different language, and if they had intended for the constitutional amendment to have a different meaning, presumably they would have done so.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

February 6, 2015

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* * *

Nos. 14-4546, 14-4568, 14-4569

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL;

Plaintiffs-Appellees,

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission; NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; NEW JERSEY SPORTS & EXPOSITION AUTHORITY;

-and-

STEPHEN M. SWEENEY, President of the New Jersey Senate; VINCENT PRIETO, Speaker of the New Jersey General Assembly (Intervenors in District Court),

Defendants-Appellants.

On Appeal from the United States District Court for the District of New Jersey
No. 3:14-cv-06450-MAS-LHG

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February 13, 2015

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* * *

INTRODUCTION

This case involves the latest in a series of efforts by New Jersey to authorize sports gambling at its casinos and racetracks in violation of the Professional and Amateur Sports Protection Act ("PASPA"). After failing to convince this Court that New Jersey may simply ignore PASPA because it is unconstitutional, the sponsors of the invalidated 2012 Sports Wagering Law vowed that they would not be deterred in their efforts to bring sports gambling to New Jersey's casinos and racetracks. And they were not.

A mere three days after the Supreme Court declined to review this Court's decision holding that PASPA is constitutional, the New Jersey legislature passed a new law purporting to "repeal" the state's sports gambling prohibitions, but to do so *only* at casinos and racetracks—in other words, only at state-licensed gambling venues. The Governor vetoed that blatant attempt, as he put it, "to circumvent the Third Circuit's ruling" and "to sidestep federal law." But just two months later, the Governor saw things differently, and signed into law the 2014 Sports Wagering Law that is the subject of this lawsuit. Just like the legislation that the Governor vetoed mere months earlier, the 2014 Law purports to "partially repeal" New Jersey's sports gambling prohibition, but only as applied to sports gambling that occurs at a casino or racetrack, by individuals who are 21 or older, and on particular sporting events.

The 2014 Law is no more consistent with PASPA than the invalidated 2012 Law was. Just as before,

New Jersey has enacted a law that ensures that sports gambling will occur only under the conditions of the state's choosing. It has dictated where sports gambling may occur, by whom, and even which sporting events will be excluded. Worse still, New Jersey has dictated that sports gambling must be only at state-licensed gambling venues, thereby ensuring that the sports gambling it has authorized will occur only under the auspices of a state license. In a sea of prohibitions on sports (and other) gambling, New Jersey has dictated that sports (and other) gambling is permitted only at these islands of state-authorized gambling. No matter what New Jersey tries to label those actions, those cosmetic efforts cannot hide the reality that the 2014 law is yet another attempt to authorize state-licensed sports gambling in violation of PASPA.

Implicitly recognizing as much, the defendants devote most of their energy to trying to convince this Court that its decision rejecting their commandeering challenges to PASPA somehow entitles states to violate PASPA with impunity so long as they label their actions "repeals" rather than "authorizations." This Court's opinion does no such thing. In fact, this Court explicitly considered and explicitly *rejected* the very same argument that the defendants repeat anew here—namely, that if PASPA forces states to choose between prohibiting sports gambling entirely or not at all, then it unconstitutionally commandeers the states. The defendants' continued disagreement with the Court's conclusion does not entitle them to another bite at the constitutional apple.

At bottom, no amount of clever labeling or parsing of this Court's opinion can save the defendants from

the conclusion that the District Court correctly reached: Like the 2012 Law before it, the 2014 Law authorizes state-licensed sports gambling in violation of PASPA. The court therefore correctly enjoined the state defendants from giving the law any operation or effect.

STATEMENT OF ISSUES

Whether the District Court correctly concluded that New Jersey's attempt to "partially repeal" its otherwise-blanket sports gambling prohibitions solely at state-licensed gambling venues, and solely if those venues confine sports gambling to the persons and sporting events of the state's choosing, violates PASPA's prohibitions against authorizing or licensing sports gambling.

* * *

SUMMARY OF ARGUMENT

This is a case of déjà vu all over again. Dissatisfied with Congress' decision to prohibit states from authorizing sports gambling, in 2012, New Jersey decided to simply ignore PASPA and press ahead with its plans to authorize sports gambling in its casinos and racetracks. Now, dissatisfied with this Court's conclusion that nothing in the Constitution allows it to violate PASPA, New Jersey has decided to ignore that decision and, once again, press ahead with its plans to authorize sports gambling in its casinos and racetracks. New Jersey's attempts to evade federal law fare no better this time around.

Notwithstanding the state's deliberate effort to style the 2014 Sports Wagering Law as a "repeal" rather than an "authorization," there is no escaping the reality that New Jersey has enacted a law that dictates where sports gambling may occur, by whom, and on what sporting events. The notion that this does not amount to an authorization of sports gambling on the state's chosen terms blinks reality. But for the 2014 Law, casinos, racetracks, and their patrons would remain subject to the same still-intact complete prohibitions on sports gambling as everyone else in New Jersey. Accordingly, their "right" to operate and engage in sports gambling derives not from the absence of any state law dictating otherwise, but from New Jersey's affirmative act giving them—and them alone—the opportunity of engaging in an activity denied to everyone else. The defendants cannot plausibly claim that these actions have not lent the state's imprimatur to the sports gambling that the 2014 Law authorizes.

And to make matters worse, New Jersey has made sports gambling legal *only* if it takes place at a state-licensed venue for state-authorized gambling. In other words, New Jersey has made obtaining a license or permit to operate a commercial gambling establishment a condition of operating sports gambling. Like its 2012 predecessor, the 2014 Law thus violates PASPA twice over: It not only authorizes sports gambling, but also ensures that it will take place only under the auspices of a state license—and a state license to operate a commercial, state-sanctioned gambling establishment, no less. That the 2014 Law achieves this end indirectly, rather than by establishing a distinct "sports gambling licensing regime" is no matter. Either way, the ultimate result is the same. Indeed, the

ultimate result is remarkably similar to the option Congress gave New Jersey for only one year to allow sports gambling only at state-licensed casinos. Having passed on that option in the early 1990s, New Jersey cannot seriously contend that PASPA allowed it to accomplish the same thing in 2014. That the 2014 Law *purports* not to authorize or license sports gambling is equally beside the point. It is the substance, not the form, of a state law that governs a preemption analysis, and the substance of the 2014 Law could not be clearer: The law authorizes state-licensed sports gambling in violation of PASPA.

The defendants' principal response to all this is to insist that this Court's decision in *Christie I* somehow entitles states to make any sports gambling policies they choose, so long as they do so under the guise of "repealing" existing sports gambling prohibitions, rather than expressly "authorizing," "licensing," or "regulating" the sports gambling that they permit. Even a cursory reading of this Court's decision confirms that it does no such thing. In fact, this Court explicitly *rejected* the notion that there is anything constitutionally problematic about reading PASPA to force states to choose between retaining complete bans on sports gambling or repealing those bans *in their entirety*. Although the Court acknowledged that this may be a difficult choice, it did not find the choice *unconstitutional*. Whether PASPA leaves states with other options is therefore beside the point, as neither PASPA nor this Court's opinion authorizes New Jersey to do what it has done here. The defendants' attempts to resist that conclusion are nothing more than attempts to relitigate a constitutional question that this Court already has resolved.

The defendants are no more successful in their efforts to attack the injunction the District Court ordered. The state defendants' Eleventh Amendment argument fails because it rests on the same faulty premise as their merits arguments—namely, that the 2014 Law does not authorize or license sports gambling. In fact, that is precisely what the 2014 Law does. And the state defendants are precisely the parties through which the law does so, as they bear direct responsibility for issuing the licenses under which the sports gambling that the law authorizes will occur. That makes them the right defendants in this case for the same reason that they were the right defendants in the last one, as they are the state officers whose actions are resulting in violations of PASPA.

The District Court also correctly concluded that the 2014 Law should be denied operation or effect in its entirety, rather than permitted to operate in some circumstances but not others or, worse still, converted into the complete *repeal* of New Jersey's sports gambling prohibitions that the legislature pointedly declined to adopt. If New Jersey wants to repeal its sports gambling prohibitions in their entirety, it remains free to do so—which is precisely why the defendants' commandeering arguments fare no better the second time around. But the defendants have no business asking this Court to force that decision upon the people of New Jersey under the guise of conducting a severability analysis.

ARGUMENT

I. The 2014 Sports Wagering Law Plainly Violates PASPA.

New Jersey's latest attempt to authorize sports gambling is just as unlawful as its invalidated attempt to do so through the 2012 Sports Wagering Law. There is no question that PASPA prohibits states from authorizing or licensing sports gambling, and there is now no question that PASPA's prohibitions are constitutional. There also is no question that the 2014 Sports Wagering Law violates them. Although styled as a "partial repeal," the law in fact authorizes sports gambling under the limited circumstances of the state's choosing, dictating where it may occur, by whom, and on what sporting events. Moreover, the law confines sports gambling to state-licensed gambling venues, thereby ensuring that it will occur only under the auspices of a state license. That the state has disclaimed any intent to regulate the sports gambling that the 2014 Law exempts from New Jersey's otherwise-blanket sports gambling prohibitions does not change the bottom line: Like the 2012 Law before it, the 2014 Law authorizes and licenses sports gambling in clear violation of PASPA.

A. The 2014 Sports Wagering Law Authorizes Sports Gambling in Violation of PASPA.

The defendants' defense of the 2014 Sports Wagering Law rests largely on the premise that the law does not authorize any sports gambling, but instead simply "repeals" existing prohibitions on sports gambling. That premise is demonstrably false. The 2014 Sports Wagering Law does not repeal any of New Jersey's myriad prohibitions on sports gambling. To the contrary, the state's criminal prohibitions on sports gambling remain intact. *See, e.g.*, N.J.S.A. §2c:37-2. So,

too, do all of its civil sports gambling prohibitions. *See, e.g.*, *id.* §2a:40-1. The 2014 Law instead just defines the limited circumstances under which the state will now treat sports gambling as legal notwithstanding those prohibitions—namely, when it occurs in places of the state's choosing (state-licensed casinos or racetracks), by persons of the state's choosing (casino or racetrack patrons who are 21 or older), and on sporting events of the state's choosing (those that do not involve college sports contests taking place in New Jersey or in which a New Jersey college team is participating).

The notion that this law does not "authorize" sports gambling defies reality. The state has not deregulated all sports gambling in New Jersey or taken an agnostic position on whether or how sports gambling will occur. Instead, the state has decided on the narrow conditions under which it approves of sports gambling, and then codified those conditions as an exception to its otherwise-blanket sports gambling prohibitions. New Jersey has maintained a state-wide prohibition on sports gambling with the exception of the islands of state-authorized gambling called casinos and racetracks, and even there dictates who can bet on what. That cannot rationally be understood as anything other than an effort to permit sports gambling "under the auspices of state approval and authorization," *Christie I*, 730 F.3d at 232—*i.e.*, under the very circumstances that PASPA prohibits.

That much is clear from the manner in which New Jersey's sports gambling scheme would operate were it permitted to take effect. It is not as if New Jersey has "*no law* in place governing sports wagering," such

that the "right" to offer or engage in sports gambling "derives ... from the inherent rights" "to do that which is not prohibited" by law. *Id.* New Jersey quite clearly continues to retain laws flatly prohibiting sports gambling. Accordingly, to the extent anyone now has a "right" to offer or engage in sports gambling in New Jersey, that "right" derives solely from the 2014 Law itself, which sets forth the conditions with which people or entities must comply to avail themselves of the exception to the state's sports gambling prohibitions. In other words, the 2014 Law affirmatively grants casinos, racetracks, and their 21-or-older patrons a legal "right" that New Jersey has denied everyone else in the state. That is the very definition of authorization. *See*, e.g., Merriam-Webster.com, http://www.merriam-webster.com/dictionary/authorize (defining "authorize" as "to give power or permission to," or "to give legal or official approval to").

That the state achieved this end by purporting to "repeal" its sports gambling prohibitions when its chosen conditions are satisfied rather than declaring that sports gambling "may occur" under such circumstances does not change that bottom line. After all, "'[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention [or omission] of [a] word,' nor can it 'be evaded by formalism,' which would only 'provide a roadmap for States wishing to circumvent' federal law." JA29 (citation omitted) (quoting *Haywood*, 556 U.S. at 742 & n.9; *Howlett*, 496 U.S. at 382-83). Instead, it is the substance of a state law that governs the preemption analysis. *See, e.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214-15 (2004) (states may not "'elevate form over substance ... to evade'" federal preemption). And the substance

of the 2014 Law could not be clearer: The law authorizes sports gambling under the conditions of the state's choosing.[1]

That does not necessarily mean, as the defendants insist, *see* Sweeney Br.24-25, that there could never be a scenario in which a state prohibits some but not all forms of sports gambling without running afoul of PASPA. But the backdrop of how a state deals with sports gambling as a general matter must inform the analysis of whether efforts to address specific types of sports gambling are consistent with PASPA. Here, New Jersey has created a default rule that sports gambling is flatly impermissible, and then established only a limited set of conditions under which that default rule will no longer govern. Whether a different state with a different default rule could prohibit some but not all sports gambling without violating PASPA is therefore beside the point, as there is no escaping the conclusion that what New Jersey has done is given its imprimatur to certain forms of sports gambling.

The state has done so, moreover, on the heels of a law that sought to achieve the same basic end through an unambiguous authorization of sports gambling that the state itself acknowledged violated a federal statute. *Cf. Gilmore v. City of Montgomery, Ala.*, 417

[1] That conclusion also is consistent with the New Jersey Constitution, which commands that all forms of gambling conducted in a casino "shall be determined by or pursuant to the terms of [a] law authorizing the establishment and operation thereof." N.J. Const. art. IV, §VII, ¶2D; *see also In re Casino Licensees*, 633 A.2d at 1052. Accordingly, as a matter of state constitutional law, the legislature is powerless to permit any form of gambling in casinos that is not specifically authorized by law.

U.S. 556, 566-67 (1974) (recognizing that prior efforts to evade federal law can inform interpretation of what appear to be subsequent efforts to do the same). And, as the coup de grâce, the state has done so in a way that ensures that sports gambling will occur only in state-licensed gambling venues, a subset of which were the express subject of a one-year-only option for New Jersey to allow limited sports gambling without violating PASPA. *See* Part I.B *infra*. Whatever else a state may do without violating PASPA, it most certainly may not do that.

The defendants' contrary arguments rest on the mistaken assumption that there is no meaningful distinction between withdrawing prohibitions on *all* sports gambling and withdrawing prohibitions on *some* sports gambling. *See* NJ Br.34. But the difference between the two is self-evident. In the former situation, a state is disclaiming any role in determining whether or to what extent sports gambling is appropriate. There is no de facto authorization of some sports gambling. But in the latter, a state is labeling some sports gambling a societal evil and other sports gambling a societal good. That is precisely the kind of "'label of legitimacy'" that the defendants themselves concede PASPA prevents states from attaching to sports gambling. NJ Br.33 (*quoting Christie I*, 730 F.3d at 237). In short, New Jersey may not carefully calibrate its sports gambling prohibitions to allow only the limited forms of sports gambling that it prefers, then turn around and disclaim any intent to authorize or approve of that sports gambling. Nor may it avoid a preemption problem through the simple expedient of declaring that it "does not intend for the Act to do anything that PASPA prohibits." Sweeney Br.7.

In all events, the intention behind the state's actions is hardly a mystery. New Jersey has made no secret of the fact that it affirmatively welcomes sports gambling in its casinos and racetracks. Indeed, far from disclaiming any intent to lend a label of legitimacy to the sports gambling the legislature authorized, Senate President Stephen Sweeney has celebrated all the ways that sports gambling purportedly will inure to the state's benefit, including by providing "a windfall for New Jersey taxpayers and help[ing] stabilize a gaming industry that is critical to the state's economy." John Brennan, *UPDATED: Reactions to the NJ sports betting ruling*, NorthJersey.com (Nov. 21, 2014), http://perma.cc/bj96-zmkq. Those are hardly the words of a legislature that "does not intend for any entity to perceive" of its actions as an "approval or authorization" of sports gambling. NJ Br.35.

B. The 2014 Sports Wagering Law Licenses Sports Gambling in Violation of PASPA.

That the state's chosen conditions for approving of sports gambling include confining it to casinos and racetracks makes the violation of PASPA all the more blatant. By law, a casino cannot "operat[e]" in Atlantic City "unless and until a valid operation certificate has been issued" to it by the Division of Gaming Enforcement (DGE). N.J.S.A. §5:12-96. Likewise, a racetrack cannot offer gambling unless and until it is "granted a permit" by the New Jersey Racing Commission (NJRC). *Id.* §5:5-50. And casino and racetrack operators must satisfy countless conditions to obtain and retain the state's permission to operate these commercial gambling establishments. *See generally* N.J.A.C. §§13:69—13:74B.

For example, an applicant for a casino license must submit to a criminal history background check and provide documentation and assurances of financial stability and personal integrity. *See* N.J.S.A. §5:12-84; N.J.A.C. §§13:69C-4.2, 13:69C-5.3. A corporation must be incorporated in New Jersey to apply for such a license, *see* N.J.S.A. §5:12-82(d), and must provide a slew of information about itself, including personal employment and criminal histories of all corporate officers, directors, and other employees; all holding, intermediary, and subsidiaries companies; the terms and structure of any authorized securities issued by the corporation; the terms and conditions on all outstanding loans and debts; equity holdings of all officers, directors, and underwriters; a description of all bonus and profit-sharing arrangements; and copies of all management and service contracts. *See, e.g.*, N.J.S.A. §5:12-85; N.J.A.C. §§13:69C-2.3, 13:69C-2.4, 13:69C-4.3.

And layered on top of these extensive qualification requirements are intricate regulations of the casinos themselves, which cover everything from the size of the facility, who may enter, how alcohol may be sold, what entertainment may be offered, and what security must be employed. *See, e.g.*, N.J.A.C. §§13:69G-1.3 (requiring casinos to exclude "[a]ny person who has been convicted of a criminal offense under the laws of any state, or of the United States, which is punishable by more than six months of incarceration, or who has been convicted of any crime or offense involving moral turpitude, and whose presence in a licensed casino establishment would be inimical to the interest of the State of New Jersey or of licensed gaming therein"), 13:69G-1.7, 13:69C-6.4, 13:69C-

7.1(b)(2), 13:69C-7.3, 13:69C-15.1, 13:69I-1.3; N.J.S.A. §§5:12-98 (requiring each casino hotel to have "[a] closed circuit television system according to specifications approved" by DGE, "with access on the licensed premises to the system"), 5:12-103.

As these myriad restrictions and requirements confirm, it is no accident that New Jersey has "repealed" its sports gambling prohibitions only at state-licensed casinos and racetracks. By imposing that limitation, New Jersey has ensured that any sports gambling occurring within its borders will be overseen by entities that the state has deemed qualified to operate commercial gambling establishments, and only in facilities designed and operated according to the state's specifications. In doing so, New Jersey not only has "authorize[d]" sports gambling, but has "license[d]" it as well. 28 U.S.C. §3702(1); *see also* U.S. Br.11-12 ("By confining the operation of the 2014 Act to facilities that are operated pursuant to gambling licenses, New Jersey is engaged in licensing under the guise of repeal.").[2]

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[2] To the extent the defendants continue to argue that the 2014 Law allows sports gambling to be conducted at the site of the former Garden State Park racetrack without a gambling license or permit, *see* Sweeney Br.5-6 n.5, that argument is meritless. As the defendants themselves have acknowledged, various legislative and other efforts have been made to authorize the establishment of an off-track betting parlor at that location. Leagues Reply 4 n.2 (ECF #49). It is clear that the 2014 Law is intended to authorize sports gambling at this location *only* if those efforts to convert it into an off-track betting establishment are successful. Of course, off-track betting is subject to its own detailed licensing regime. *See* N.J.S.A. §§5:5-127–5:5-160.

Implicitly recognizing this problem, the defendants emphasize that the 2014 Law disclaims any intent to "license" sports gambling and "has no licensing scheme" of its own. *See* NJ Br.32; N.J.S.A. §5:12A-8. But that ignores the obvious reality that it is the existence of the licensing regime for casinos and racetracks that obviates the need for a separate licensing regime for sports gambling. In a state without licensed casinos and racetracks, a state would need to create a licensing system from scratch. New Jersey's ability to piggyback on an existing licensing regime for casinos and racetracks does not exempt New Jersey from PASPA. If there were any doubt on that score, it would be removed by the one-year-only option Congress extended to New Jersey. Congress specifically adverted to the reality that New Jersey had authorized gambling "conducted exclusively at casinos" that already were subject "to a comprehensive system of State regulation." 28 U.S.C. §3704(a)(3). But Congress did not give New Jersey a permanent option to piggyback onto that pre-existing licensing scheme; it instead gave New Jersey only a one-year window that closed decades ago.

The state defendants protest that not every activity that occurs at a business with a state license necessarily occurs "under the auspices of" that license. *See* NJ Br.44. That may be so in many instances, but it is decidedly not the case when, as here, the state dictates that an activity may be carried out *only* at a business that operates with such a license. The state defendants' veterinarian services example is illustrative. *See* NJ Br.43-44. To be sure, if the state allowed anyone and everyone to offer pet-boarding services, then a veterinarian who was licensed to administer

medicine and also offered pet-boarding services would not be offering the latter "under the auspices of" its license to do the former. So, too, if (as New Jersey apparently does) a state required separate licenses for each service and a veterinarian acquired one of each. But if the state enacted a law allowing pet-boarding services to be offered *only* by veterinarians who are licensed to administer medicine, then such a veterinarian most certainly would be offering pet-boarding services under the auspices of its license to administer medicine; but for the license to offer the latter, the veterinarian could not offer the former.

In short, there is no meaningful difference between licensing an entity to offer sports gambling, and licensing an entity to offer gambling generally and then enacting a law that permits only those licensees to offer sports gambling. Either way, New Jersey has made obtaining a license or permit from the state a condition of offering sports gambling, and thus has authorized sports gambling "under the auspices of a state license." *Christie I*, 730 F.3d at 236. The state defendants' insistence (at 44) that there is "no logical stopping point" to "this reasoning" is fundamentally flawed, as there is nothing "illusory" about the distinction between allowing sports gambling to be carried out *anywhere* (including at businesses that operate with some form of license) and allowing sports gambling to be carried out *only* at places that have a commercial gambling license. New Jersey cannot elide the obvious difference between the two by disingenuously declaring that the 2014 Law is "not intended" and "shall not be construed" to do what it plainly does, N.J.S.A. §5:12A-8—particularly when those declarations are a transparent attempt to evade federal law.

C. New Jersey's Attempts to Reconcile the 2014 Sports Wagering Law With PASPA Are Unavailing.

The defendants alternatively protest that New Jersey's actions are consistent with PASPA because the state is not "regulat[ing]" the sports gambling that the 2014 Law authorizes under the auspices of a state license. NJ Br.35-36, 40-42; *see also* Sweeney Br.7-8. At the outset, whether the 2014 Law "regulates" the sports gambling that it authorizes and licenses is largely beside the point, as PASPA does not confine its prohibitions to "state-*regulated*" sports gambling. It instead makes it unlawful for a state "to sponsor, operate, advertise, promote, license, or authorize by law" sports gambling. 28 U.S.C. §3702. The degree of oversight a state chooses to exercise over the sports gambling that it authorizes or licenses is therefore irrelevant. What Congress sought to prevent was the "lending" of the state's "imprimatur to gambling on sports." *Christie I*, 730 F.3d at 240. As Congress recognized in crafting PASPA's prohibitions, a state does not cease to lend that imprimatur just because it decides not to otherwise regulate the sports gambling that it authorizes or licenses.

In any event, the suggestion that the 2014 Law "is an absolute forfeiture of regulatory authority" over sports gambling is defeated by the law itself. NJ Br.40. The law exercises regulatory authority over sports gambling in the most basic way possible: by dictating where it may take place, by whom it may take

place, and on what sporting events it may take place.[3] To call that "unregulated" sports gambling is akin to calling sales of beer "unregulated" so long as they are made only by liquor stores that are licensed to sell alcohol, only to customers who are 21 or older, and only in bottles not cans. That a state did not take the additional steps of dictating the size of a liquor store or the prices it may charge, *see* NJ Br.41-42, would not negate the regulatory oversight that the state *did* choose to exercise.

The incompatibility of New Jersey's actions and PASPA is underscored by the statute's one-year-only window for New Jersey. As section 3704(a)(3)(B) makes crystal clear, Congress specifically recognized that the "comprehensive system of State regulation" that governed "commercial casino[s]" that operate in Atlantic City would allow New Jersey to permit sports gambling at those casinos more readily than other states without comparable venues for state-licensed and state-authorized gambling. Congress expressly contemplated the possibility of New Jersey allowing sports gambling at those venues—and those venues alone. And Congress' judgment was not that sports gambling at state-licensed casinos was consistent with the prohibitions of PASPA. To the contrary, Congress gave New Jersey a one-year window to pass legislation that would qualify for an exception to PASPA.

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[3] Moreover, the state appears to continue to assert authority to regulate sports gambling in other ways, including by enforcing unspecified "generally applicable" laws and collecting taxes on sports gambling revenues. See, *e.g.*, NJ Br.44-45; NJ Mem. in Opp. 17 n.4 (ECF #44).

Having declined that option in 1993, New Jersey cannot achieve the same reality 20 years later by relaxing its state-wide prohibition only at state-licensed casinos and racetracks.

In the end, there is no escaping the conclusion that New Jersey has, once again, authorized licensed sports gambling in violation of PASPA. Indeed, New Jersey's own legislators have readily conceded that the 2014 Law is yet another attempt to "implement well regulated sports gaming" in New Jersey. JA434. As they explained, the goal of the law is to give state-licensed gambling venues "a shot in the arm"—*i.e.*, "to do something for the gaming business in the state of New Jersey." JA91; *see also, e.g.*, JA124-25. Whatever the merits of that goal as a policy matter, New Jersey may not seek to achieve it by authorizing and licensing sports gambling in violation of PASPA.

II. New Jersey's Appeals To Commandeering Principles Rehash Arguments This Court Already Rejected.

Implicitly recognizing that the 2014 Sports Wagering Law cannot seriously be understood as anything other than an effort to authorize licensed sports gambling, the defendants devote the bulk of their briefs to attempting to relitigate constitutional issues that this Court already resolved. In their view, unless PASPA allows states to "partially repeal" their gambling prohibitions in this manner, thereby achieving sports gambling only at the places, by the persons, and on the sporting events of their choosing, the statute unconstitutionally compels states "to maintain existing laws." NJ Br.30; *see also* Sweeney Br.13.

That argument fails for the same reason that this Court rejected it the last time the *Christie I* defendants made it: PASPA simply does not require New Jersey to keep any of its existing laws on the books. *See Christie I*, 730 F.3d at 232 ("We do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering."). If New Jersey wants to repeal its sports gambling prohibitions entirely, it remains just as free to do so now as it was when this Court considered the question two years ago. That New Jersey would prefer to have some middle path whereby it may "partially repeal" those prohibitions only to the extent that they would prohibit sports gambling that it affirmatively welcomes does not mean that *PASPA* (or the District Court's injunction, *see* NJ Br.30) has forced New Jersey to "maintain" its "existing laws." Instead, sports gambling remains prohibited in New Jersey after the invalidation of the 2014 Law because New Jersey remains unwilling to accept the option Congress has given it of repealing its sports gambling prohibitions in their entirety.

Contrary to the defendants' suggestions, there is nothing at all anomalous about the fact that the "partial repeal" option New Jersey seeks to exercise here is off the table. That kind of limitation on a state's options is a natural consequence of countless preemption schemes. For instance, a state does not have the option of "partially repealing" federal standards that it has agreed to adopt and enforce on the federal government's behalf. *See, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). But that does not mean that a state is being "forced" to keep those standards on its books, as the state always retains the option of repealing them *in their entirety*

and ceding to the federal government the power to enforce its own policies. That a state must choose between retaining federal standards in their entirety or not at all does not mean that it has no choice. Here, too, if it is more important to New Jersey to legalize sports gambling in its casinos and racetracks than to prohibit it everywhere else, then New Jersey is free to eliminate its sports gambling prohibitions in their entirety. That New Jersey does not like that option does not change the reality that its blanket sports gambling prohibitions remain in force because *New Jersey* has decided to continue to retain them.

The defendants alternatively protest that, if PASPA forces states to choose between complete prohibition and complete repeal, it is unconstitutional. *See* NJ Br.29. If that argument sounds familiar, that is because it tracks nearly verbatim the argument the *Christie I* defendants made last time they tried to convince this Court that PASPA is unconstitutional. *See, e.g.*, *Christie I*, NJ Br.51 ("Giving a State a choice between prohibiting sports wagering or allowing wagering to take place without *any* controls at all does not cure the commandeering defect because the latter alternative is manifestly unacceptable and thus presents no 'choice' at all."); *id.* at 52 ("Congress cannot avoid the anti-commandeering limitation simply by giving a State a 'choice' between implementing Congress's preferred regulatory scheme and courting limited anarchy."); *Christie I*, NJ Reply Br.19 ("reading ... PASPA ... [to] put States to the choice of either prohibiting private sports wagering schemes altogether or permitting them in an utterly unfettered environment" would "circumvent the prohibition on 'requiring

the States in their sovereign capacity to regulate their own citizens'").

Of course, this Court emphatically *rejected* that argument in the course of rejecting the *Christie I* defendants' contention that PASPA runs afoul of the commandeering doctrine. As the Court explained, "to the extent we entertain the notion that PASPA's straightforward *prohibition* on action may be recast as presenting two *options*, these options" create no constitutional problem, as they are "quite unlike" the kinds of "coercive choices" that have been held to constitute commandeering. 730 F.3d at 233 (emphasis in original). The "two options" the Court identified in reaching that conclusion were the same two options New Jersey still has now: (1) "a state may repeal its sports wagering ban," or (2) "a state may choose to keep a complete ban on sports gambling." *Id.* Whether PASPA does in fact put states to that binary choice is therefore irrelevant from a constitutional standpoint, as this Court unambiguously concluded that the statute need not be construed to offer states anything more in order to avoid a commandeering problem.

The defendants nonetheless insist that this Court's opinion somehow entitles New Jersey to a third option under which it may permit the sports gambling that it does like while still prohibiting the sports gambling that it does not like. The opinion itself is answer enough to that. The "exact contours" language on which the defendants rely so heavily in making that argument comes in a sentence identifying what a state may do if it "choose[s] to keep a *complete ban* on sports gambling." *Id.* (emphasis added). In that situation, the court observed, "it is left up to each state to

decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be." *Id.*

The defendants cannot plausibly convert a description of what a state may do if it *keeps* a "complete ban" into an entitlement to keep something *less* than a "complete ban." Instead, what the Court plainly was contemplating in that passage were changes to the "exact contours" of a state's scheme for *enforcing* its complete ban—*i.e.*, whether it will be enforced civilly or criminally, what penalties will attach, and so on. That much is clear from the fact that the "exact contours" language is preceded immediately by a reference to "how much of a law enforcement priority [the state] wants to make of sports gambling" if it maintains its complete ban. *Id.* It is also clear from the dissent's characterization of the majority's opinion as finding no constitutional problem with reading PASPA to "essentially give[] the states the choice of allowing totally unregulated betting on sporting events or prohibiting all such gambling." *Id.* at 241 (Vanaskie, J., concurring in part and dissenting in part).

Indeed, in attempting to convince the *en banc* Court and the Supreme Court to reconsider the panel's decision, the defendants themselves acknowledged repeatedly that this Court did not premise its rejection of their commandeering argument on the existence of any "option three." For instance, in their *en banc* petition, the state officers in *Christie I* complained that the panel erred by holding that no constitutional problem results from interpreting PASPA to "command[] States to address sports wagering within

their borders according to only one of *two* congressionally approved options: 'a state may choose to keep a *complete* ban on sports gambling' or it 'may repeal its sports wagering ban' but without a system of licensing to regulate the resulting market." *Christie I*, NJ Rehearing Pet.2 (emphasis added). Likewise, in their petition for certiorari, the state officers complained that this Court erred by holding that there is nothing unconstitutional about reading PASPA as forcing a state to choose whether "to *entirely* 'repeal[] its ban'" on sports gambling. NJ Cert. Pet.15 (emphasis added).

The defendants nonetheless protest that, without the third option they now attempt to squeeze out of this Court's opinion, states would no longer have "much room ... to make their own policy" with respect to sports gambling. *Christie I*, 730 F.3d at 233. To be sure, that is the argument that the *dissent* advanced in *Christie I*. *See id.* at 250 n.9 (Vanaskie, J., concurring in part and dissenting in part) ("I fail to discern the 'room' that is accorded the states to make their own policy on sports wagering" if "the only choice is to allow for completely unregulated sports wagering ... or to ban sports wagering completely."). But it is an argument that the majority expressly *rejected*. As the majority explained, "that these are not easy choices ... does not mean that [states] were given no choice at all, or that the choices are otherwise unconstitutional." *Id.* at 233. The Court would hardly have needed to emphasize the difficulty of the choice states may face under PASPA had its constitutional analysis assumed that New Jersey remained entitled to retain complete control over the extent to which legalized sports gambling is permitted within its borders, so long as it does

so under the guise of "partially repealing" existing prohibitions.

The defendants fare no better with their reliance on this Court's rejection of the "'false equivalence' between a repeal and an authorization," *id.* *See, e.g.*, NJ Br.22; Sweeney Br.13-14. To be sure, the Court rejected the *Christie I* defendants' argument that there is *never* a meaningful difference between a "repeal" and an "authorization." *See Christie I*, 730 F.3d at 232 (rejecting argument that "PASPA precludes repealing prohibitions on gambling just as it bars affirmatively licensing it"). But the Court in no way suggested that "states retain the freedom to repeal *any* of their laws that they wish to repeal" without running afoul of PASPA. Sweeney Br.23 (emphasis added).[4] Nor did the Court ever suggest that simply labeling a law a "repeal" would obviate the need to examine whether it is in fact an attempt to authorize or license sports gambling. *See* Sweeney Br.19-24. As the state itself concedes, "*Christie I* does not create a magic words test." NJ Br.45 n.4.

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[4] Nor did the United States in its brief in opposition to the *Christie I* defendants' petitions for certiorari. Although that brief noted that "New Jersey is free to repeal [state-law] prohibitions *in whole or in part*," U.S. BIO 11, *Christie*, 134 S. Ct. 2866 (2014) (emphasis added), the United States has since made clear that it never intended to suggest "that *every* partial repeal of a state's prior sports betting prohibitions will automatically satisfy PASPA, or that a state legislature is free to enact any laws that it wishes regarding sports gambling as long as it takes care to frame them as 'partial repeals' of existing prohibitions." U.S. Br.14. And what kinds of partial repeals might satisfy PASPA is a question the Court need not answer in this case, as this partial repeal most certainly does not. *See id.* at 9; *supra* Part I.A.

Finally, there is no more merit to the suggestion that PASPA sanctions every state scheme that purports to leave legalized sports gambling "unregulated." The Court certainly recognized that "*complete* deregulation" of sports gambling is consistent with PASPA. *Christie I*, 730 F.3d at 235 (emphasis added). But, as noted, *see* Part I.A *supra*, there is an obvious difference between *completely* deregulating sports gambling, and dictating where, how, and by whom it may take place but then declining to exercise further regulatory authority. Nothing in this Court's opinion suggests that it failed to grasp the basic distinction between the two.

At bottom, the defendants' commandeering arguments are nothing more than an ill-conceived effort to relitigate a constitutional question that this Court already resolved. Worse still, those arguments continue to rest on the very same flawed reading of PASPA as compelling states "to maintain existing laws," NJ Br.30, that this Court already so thoroughly rejected. The defendants' continued disagreement with this Court's resolution of those arguments does not entitle them to a second bite at the constitutional apple.

* * *

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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February 13, 2015

(ORDER LIST: 582 U.S.)

TUESDAY, JUNE 27, 2017

* * *

CERTIORARI GRANTED

15-1439 CYAN, INC., ET AL. V. BEAVER CTY. EMPLOYEES, ET AL.

The petition for a writ of certiorari is granted.

16-476 CHRISTIE, GOV. OF NJ, ET AL. V. NCAA, ET AL.

16-477 NJ THOROUGHBRED HORSEMEN V. NCAA, ET AL.

The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument.

16-492 PEM ENTITIES LLC V. LEVIN, ERIC M., ET AL.

The petition for a writ of certiorari is granted.

16-534 RUBIN, JENNY, ET AL. V. IRAN, ET AL.

The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. Justice Kagan

took no part in the consideration or decision of this petition.

16-1144 MARINELLO, CARL J. V. UNITED STATES

The petition for a writ of certiorari is granted.

* * *

RECORD AND BRIEFS

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IN THE
Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

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QUESTION PRESENTED

Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York* v. *United States*, 505 U.S. 144 (1992)?

PARTIES TO THE PROCEEDING

Petitioners Christopher J. Christie, as Governor of the State of New Jersey; David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; Frank Zanzuccki, Executive Director of the New Jersey Racing Commission; Stephen M. Sweeney, President of the New Jersey Senate; Vincent Prieto, Speaker of the New Jersey General Assembly; and the New Jersey Thoroughbred Horsemen's Association, Inc. were appellants in the court of appeals. The New Jersey Sports and Exposition Authority was a defendant in the district court.

The National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the Commissioner of Baseball were appellees in the court of appeals.

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OPINIONS BELOW

The opinion of the *en banc* court of appeals is reported at 832 F.3d 389 (3d Cir. 2016). *See* Pet. App. A. The opinion of the three-judge panel of the court of appeals is reported at 799 F.3d 259 (3d Cir. 2015). *See* Pet. App. C.

The opinion of the district court granting summary judgment to respondents and the order enjoining State officials from giving effect to New Jersey's 2014 repeal of state-law prohibitions on sports wagering is reported at 61 F. Supp. 3d 488 (D.N.J. 2014). *See* Pet. App. D; JA382.

JURISDICTION

The court of appeals had jurisdiction to review the district court's final judgment and permanent injunction pursuant to 28 U.S.C. §§ 1291 & 1292(a). The court of appeals granted *en banc* rehearing on October 14, 2015, and entered its judgment on August 9, 2016. *See* Pet. App. G. Petitioners timely filed a petition for a writ of certiorari on October 7, 2016, which this Court granted on June 27, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 3702(1) of the Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701 *et seq.* (PASPA) provides:

It shall be unlawful for--

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, * * *

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702(1).

Other pertinent constitutional provisions and statutes are reprinted in the Appendix, *infra*, 1a.

STATEMENT

One of the "essential postulates" derived from the "structure of the Constitution," is that "state legislatures are *not* subject to federal direction." *Printz* v. *United States*, 521 U.S. 898, 912, 918 (1997) (citations omitted). Indeed, this anti-commandeering principle is so vital to the functioning of our federalist system of government that this Court has held that "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *New York* v. *United States*, 505 U.S. 144, 178 (1992). "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166.

PASPA compels States to regulate—indeed, prohibit—sports wagering and therefore exceeds Congress's authority.

In 2012, New Jersey attempted to adopt a carefully crafted regulatory regime to control sports wagering that was already taking place within its borders, and asserted that PASPA would violate the Tenth Amendment if it prohibited New Jersey from doing so. Respondents and the United States claimed that New Jersey's regulations violated PASPA and argued that PASPA was constitutional because it did not require States to maintain prohibitions against sports wagering. Rather, it prohibited only "licensing" and other affirmative "authorizations by law"—and thus did not impermissibly direct States in the exercise of their police powers. The Third Circuit adopted this reasoning—it held that to construe PASPA to require New Jersey to "keep a ban on sports gambling in their books" would "rest[] on a false equivalence between repeal and authorization," Pet. App. 160a—and upheld PASPA as so construed. This Court denied New Jersey's petition for certiorari.

New Jersey accepted the Third Circuit's ruling that New Jersey could repeal key provisions of its prohibitions on sports wagering and enacted the repeal at issue here. That repeal immediately was challenged by respondents (supported again by the United States) as a disguised authorization-by-law of sports wagering in violation of PASPA. The Third Circuit then reversed itself, held that New Jersey's repeal violated PASPA, and affirmed an injunction prohibiting the State's Executive from "giving effect" to the repeal. Pet. App. 8a.

This federal-court order now perversely compels New Jersey officials to maintain in force, as state law, prohibitions against sports wagering that, as far as the New Jersey Revised Statutes are concerned, no

longer exist. A federal court, purporting to enforce *federal law*, now is dictating the contents of New Jersey's *state law* concerning sports wagering. And New Jersey officials are drafted into service as "puppets of a ventriloquist Congress," expressing the federal commands as the laws of the State against the clear wishes of its citizens. *Printz*, 521 U.S. at 928 (quotations omitted).

Neither the district court nor the court of appeals articulated any precedent for this federal command to state officials to "give effect" to a state law the State has repealed. This is not surprising because it is difficult to imagine a more patent violation of the anti-commandeering principle—or a more destructive incursion into the reserved sovereignty of a State—than this type of federal usurpation of the lawmaking function of the State's Legislature. But that, unmistakably, is what the lower courts' injunction does.

The Third Circuit perceived no violation of the anti-commandeering principle, reasoning that PASPA "[d]oes not command states to take affirmative actions," and leaves them "sufficient room . . . to craft their own policies" concerning sports wagering. Pet. App. 23a. But whatever "room" PASPA affords to States does not include any realistic means to repeal state-law prohibitions on sports wagering applicable at casinos and racetracks. And if PASPA forbids States from repealing those particular prohibitions, then it is requiring that they be maintained, which is very much an affirmative act on the part of the State.

PASPA's conscription of New Jersey's legislative and executive branches with respect to sports wager-

ing is manifestly unconstitutional. The remaining issue is the scope of the remedy. That remedy must include excision of the statute's prohibitions on state "licens[ing]" and "authoriz[ation] by law." The United States and the Third Circuit previously stretched to avoid this conclusion by construing PASPA to permit States to repeal their prohibitions on sports wagering, while forbidding them from licensing or otherwise "authoriz[ing] by law" the activity. That approach defies the language and clear purpose of the statute, which plainly sought to force States to maintain their existing prohibitions. Had Congress understood that PASPA could not constitutionally prevent States from repealing their prohibitions on sports wagering, it certainly would not have prohibited States from responsibly regulating it through a system of licensing. Since PASPA cannot constitutionally prohibit legalization under state law, PASPA's prohibitions on state licensing and authorization by law—at least—must be stricken. And because PASPA cannot function as Congress intended without those core prohibitions, the rest of the statute must fall with them.

A. The Professional And Amateur Sports Protection Act

Until recently, nearly all States prohibited wagering on sports. Nevada legalized sports wagering in 1949, but as of 1992, no other State had broadly permitted such wagering. In that year, in response to a purported concern about "the potential effect of legalized sports gambling on America's youth," S. Rep. 102-248, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3553, and in an effort to "stop the spread of legalized gambling on sports events," 138 Cong. Rec. H11757

(daily ed. Oct. 5, 1992) (statement of Rep. Brooks), Congress enacted PASPA.

The U.S. Department of Justice "oppose[d] enactment" of the legislation. Pet. App. 225a. The Department observed that, under federal law, "it [wa]s left to the states to decide whether to permit gambling activities based upon sporting events." *Id.* at 224a. While "[f]ederal law generally prohibits any use of an interstate facility in connection with such sports-gambling activities," *ibid.*, sports wagering does not violate federal law if it is legal in the State in which it takes place, *see* 18 U.S.C. § 1084(b) (exempting "the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal").

PASPA did not alter this background federal rule. Instead, PASPA sought to "stop the spread" of sports wagering by making it "unlawful" for a State "to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering, 28 U.S.C. § 3702(1) (emphasis added), or for an individual to "sponsor, operate, advertise, or promote" sports wagering "pursuant to the law of a governmental entity," *id.* § 3702(2).

Nevada was exempted from PASPA and remained free to license and regulate sports wagering in any manner it deemed appropriate. *See* 28 U.S.C. § 3704(a)(1); Pet. App. 124a. PASPA also permitted the three other States that already had enacted sports lotteries—Montana, Delaware, and Oregon—to continue to sponsor and operate those very limited

schemes. *See* 28 U.S.C. § 3704(a)(2). Finally, PASPA included a provision under which New Jersey could have authorized and licensed sports wagering in Atlantic City, but only "pursuant to a comprehensive system of State regulation," and only if such sports wagering "was authorized" within one year of PASPA's effective date. *Id.* § 3704(a)(3). But New Jersey did not do so within the one year Congress allowed.

Because PASPA does not require the federal government to do anything in furtherance of its aim of halting the spread of sports wagering, the Congressional Budget Office reported that PASPA would have "no cost to the federal government." S. Rep. 102-248, at 10. The Department of Justice, meanwhile, expressed "concern[]" that, "to the extent [PASPA] can be read as anything more than a clarification of current law, it raises federalism issues." Pet. App. 225a.

B. The 2012 Sports Wagering Law

If PASPA was intended to halt the growth of sports wagering, it failed in that objective. While under PASPA, state-licensed and comprehensively regulated sports wagering on single games has been confined to Nevada, *unlawful* sports wagering activity has exploded. The American Gaming Association (AGA) estimates that Americans illegally gamble around $149 billion on sports events each year. *See* Br. of AGA as *Amicus Curiae* Supporting Petitioners at 11, *Christie* v. *Nat'l Collegiate Athletic Ass'n*, No. 16-476 (U.S. Nov. 14, 2016). $4.2 billion was wagered on the 2016 Super Bowl, and another $9.2 billion was wagered on the 2016 NCAA men's basketball tournament—97 percent of it illegally. *See id.* at 12.

A substantial portion of illegal sports wagering activity is conducted by organized crime syndicates that are engaged in money laundering, racketeering, human and drug trafficking, and extortion. *See id.* at 13.

Faced with this massive, underground, and largely criminal sports wagering industry, New Jersey voters in 2011 overwhelmingly approved an amendment to the State's constitution that permitted the Legislature to enact measures legalizing, regulating, and controlling sports wagering. *See* N.J. Const., art. IV, § VII, ¶ 2(D), (F). The Legislature soon did so, passing the Sports Wagering Law, P.L. 2011, c. 231 (2012) (2012 Law). The 2012 Law modified the State's longstanding ban on sports wagering to provide for the licensing of sports-wagering pools at casinos and racetracks in the State. Regulations establishing a comprehensive regime for the licensing and close supervision of sports-wagering pools—including licensing fees, internal control approvals, reserve requirements, and detailed financial documentation—soon followed. *See* N.J. Admin. Code § 13:69N-1.1 *et seq.*

C. The *Christie I* Litigation

Several professional sports leagues and the National Collegiate Athletic Association (the "Leagues"), who are the respondents here, sued to enjoin the 2012 Law and its accompanying regulations, arguing they violated PASPA's "broad ban on sports betting." Complaint ¶ 4, *Nat'l Collegiate Athletic Ass'n* v. *Gov. of N.J.* (*Christie I*), No. 12-4947 (D.N.J. Aug. 7, 2012) (ECF No. 1).

The State responded that PASPA is unconstitutional because it mandates that States "regulat[e] pursuant to Congress' direction," in violation of the

anti-commandeering principle as set forth in *New York* v. *United States*. The State argued that PASPA's mandate "that States maintain a ban on sports betting is indistinguishable from a federal law requiring States to enact laws prohibiting sports betting." State's Cross-Motion for Summary Judgment at 24, *Christie I* (D.N.J. Nov. 21, 2012) (ECF No. 76).[1]

Faced with the State's anti-commandeering argument, the Leagues abandoned their complaint's claim that PASPA imposes a "broad ban on sports betting" and argued instead that "[n]othing in PASPA necessarily compels states, either implicitly or explicitly, to maintain prohibitions on gambling." Leagues' Reply in Support of Motion for Summary Judgment at 12, *Christie I* (D.N.J. Dec. 7, 2012) (ECF No. 95). The United States, which had intervened to defend PASPA's constitutionality, similarly argued that PASPA did not "require New Jersey affirmatively to enforce its prohibitions on sports gambling." U.S. Br. in Support of Constitutionality of PASPA at 10, *Christie I* (D.N.J. Feb. 8, 2013) (ECF No. 136).

The district court granted summary judgment to the Leagues and a divided court of appeals affirmed. The panel majority acknowledged that a federal statute requiring States to maintain prohibitions on

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[1] New Jersey also argued that the Leagues would suffer no injury in fact from New Jersey's legalization, licensing, and regulation of sports wagering and thus could not establish Article III standing. New Jersey further contended that PASPA violated the equal sovereignty principle embodied in *Northwest Austin Municipal Utility District No. 1* v. *Holder*, 557 U.S. 193, 203 (2009), by allowing Nevada, for example, far greater authority in crafting its own legislation than it allows States such as New Jersey.

private conduct would raise "a series of constitutional problems." Pet. App. 160a. To avoid those constitutional problems, the court adopted the Leagues' construction of PASPA as not "requir[ing] states to keep prohibitions against sports gambling on their books." Leagues' Response Brief at 16, *Nat'l Collegiate Athletic Ass'n* v. *Gov. of N.J.* (*Christie I*), No. 13-1715 (3d. Cir. June 7, 2013); *see also* Pet. App. 158a ("we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering"); *id.* at 165a ("we have held that [PASPA] does not require states to maintain existing laws"). The court rejected the State's arguments that the Leagues had proffered a "nonsensical interpretation of a law intended to *limit* sports wagering." State Opening Brief at 19, *Christie I* (3d Cir. Apr. 29, 2013). "*All that is prohibited,*" the majority declared, "is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] *by law*' of gambling schemes." Pet. App. 158a (first emphasis added).

The State sought certiorari. After the United States assured this Court that PASPA permitted States to repeal their sports wagering bans "*in whole or in part*," JA197, this Court denied review.

D. New Jersey Repeals Its Prohibitions On Sports Wagering At Certain Venues.

New Jersey's elected officials debated how best to give effect to the wishes of New Jersey's citizens under the Third Circuit's ruling and ultimately enacted the 2014 Repeal. *See* P.L. 2014, c. 62 (2014). Unlike the 2012 Law, the 2014 Repeal does not license or regulate sports wagering. Instead, it repeals the 2012 Law

in its entirety and further "partially repeal[s] the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sports contests or athletic events." *Ibid.*

Specifically, the 2014 Repeal repeals provisions in the criminal code, *see* N.J. Stat. Ann. § 2C:37-1 *et seq.*; the civil code, *see* N.J. Stat. Ann. § 2A:40 *et seq.*, including the Casino Control Act, N.J. Stat. Ann. § 5:12-1 *et seq.*, and other provisions in chapter 5 of Title 5 of the Revised Statutes (governing racetracks); and "any rules and regulations" that "prohibit participation in or operation of" a sports-wagering pool to the extent those laws apply at casinos, racetracks, and former racetracks, P.L. 2014, c. 62, § 1. It also repeals "any rules and regulations that may require or authorize any State agency to license, authorize, permit, or otherwise take action to allow any person" to engage in sports wagering. *Ibid.*[2]

As the undisputed record before the district court makes clear, the State's primary gaming and horse racing regulatory agencies—the Division of Gaming Enforcement, the Casino Control Commission, and the New Jersey Racing Commission—have no authority under the 2014 Repeal to engage in any regulation of sports wagering. These agencies are barred from

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[2] In accordance with the amendment to the State's Constitution enacted by the voters, the 2014 Repeal also limits the repeal to "the placement and acceptance of wagers on professional, collegiate, or amateur sports contests or athletic events by persons 21 years of age or older" and excludes "a collegiate sport contest or . . . athletic event that takes place in New Jersey or a sport contest or athletic event in which any New Jersey college team participates regardless of where the event takes place." P.L. 2014, c. 62, § 1; *compare* N.J. Const., art. IV, § VII, ¶ 2(D), (F).

performing typical regulatory functions under the 2014 Repeal such as investigating the background or financial health of sports-wagering vendors, JA327; screening employees or evaluating their credentials, JA328; and requiring sports-pool lounges to use specific surveillance and security measures, *ibid.*

In short, under the 2014 Repeal, the State would have *no role* in licensing or regulating sports wagering that takes place at those locations where New Jersey's prohibitions had been repealed. Sports wagering by adults at those locations would be as legal as buying a cup of coffee at Starbucks; New Jersey would regard it as a private transaction subject only to generally applicable state and federal laws.

E. The *Christie II* Litigation

The Leagues immediately sued to enjoin the 2014 Repeal. Despite the United States' assurances in its brief opposing certiorari filed in this Court that New Jersey could repeal its prohibitions "in whole or in part," JA197, the Leagues argued instead that in fact New Jersey could only "alter or repeal aspects of its scheme for *enforcing* its prohibition." JA297. The only type of repeal of prohibitions PASPA permitted, the Leagues maintained, was one resulting in "complete deregulation." JA100. Tracking that argument, the district court held that PASPA "allow[ed] [S]tates only . . . two options": "either maintain [their] prohibition[s] on sports betting or . . . completely repeal" them. Pet. App. 99a. Since the 2014 Repeal did neither, the court held it violated PASPA and permanently enjoined the State "from violating PASPA through giving operation or effect to the 2014 Law in its entirety." *Id.* at 113a.

On appeal, the United States squarely rejected the district court's reasoning, stating that it did not "understand PASPA to draw a categorical distinction between complete and partial repeals." JA398. And the Leagues likewise sidled away from the ruling they had procured, suggesting that States might have options to legalize sports wagering short of complete deregulation, but maintaining that the 2014 Repeal nevertheless was a prohibited "authorization by law." JA415.

As in *Christie I*, a divided panel of the Third Circuit affirmed. Without acknowledging that *Christie I* had explicitly narrowed PASPA to permit repeals of state-law prohibitions to avoid "a series of constitutional problems," Pet. App. 160a, and that *Christie I* had rejected the equation of repeal with authorization as a "false equivalence," *ibid.*, the panel majority concluded that the 2014 Repeal "authorizes sports gambling by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling." *Id.* at 60a–61a. According to the majority, "[t]hat selectiveness constitutes specific permission and empowerment" that constitutes an "authoriz[ation]" that violates PASPA. *Id.* at 61a. Judge Fuentes—the author of *Christie I*—dissented, stating that the majority's reasoning that a "partial repeal amounts to authorization" was "precisely the opposite of what we held in *Christie I*." *Id.* at 67a, 72a. *Christie I* had held that PASPA did not "*require*[] that the [S]tates keep any law in place" precisely because a repeal does not constitute an authorization by law, and it was on that

basis that the majority had "found PASPA did not violate the anti-commandeering principle." *Id.* at 72a.

The Third Circuit granted rehearing *en banc* and affirmed the district court by a vote of 9-to-3. The *en banc* majority adopted the panel majority's analysis as to whether the 2014 Repeal was an "authoriz[ation] by law" in violation of PASPA. Pet. App. 10a. It then "excise[d]" "as unnecessary dicta" *Christie I*'s holding—vital to its conclusion that PASPA did not impermissibly commandeer the States—that PASPA permits States to repeal prohibitions on sports wagering. *Id.* at 23a. The majority held that "a [S]tate's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization' under PASPA." *Ibid.*

Turning to the question whether PASPA, as so construed, impermissibly commandeered the States, the majority began by acknowledging that "Congress 'lacks the power directly to compel the States to require or prohibit' acts which Congress itself may require or prohibit." Pet. App. 18a (quoting *New York*, 505 U.S. at 166). But the majority nonetheless found that PASPA was "distinguishable from [the laws] struck down . . . in *New York* and *Printz*" because it did "not impose a coercive either-or requirement or affirmative command." *Id.* at 22a, 25a.

The court of appeals rejected as "erroneous" the district court's conclusion "that PASPA presents states with a strict binary choice between total repeal and keeping a complete ban on the books." Pet. App. 24a. The court suggested that "other options,"

such as a "repeal . . . to allow *de minimis* wagers between friends and family," "may pass muster" under PASPA if they had limited "authorizing effect." *Ibid.* But the court declined to "articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, if indeed such a line could be drawn." *Ibid.* Nor did the court attempt to find a basis for such distinctions in PASPA's text. This nevertheless was sufficient for the court to conclude that States are "afforded sufficient room under PASPA to craft their own policies," and thus that PASPA "does not present a coercive binary choice." *Id.* at 23a.

The court of appeals also "rejected" New Jersey's argument that PASPA commands "affirmative action" because it demands that the State "affirmatively keep [its] prohibition on the books." Pet. App. 23a. To support this conclusion, the court block-quoted *Christie I*'s conclusion that "PASPA does not *require* or coerce the States to lift a finger." *Id.* at 25a (quoting 156a). But the *en banc* court elided the key premise for *Christie I*'s conclusion: "we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering." *Id.* at 158a. That, of course, was the statutory holding that the *en banc* court had just described as "too facile" and had "excise[d]" as "unnecessary dicta." *Id.* at 23a. Yet, absent that statutory construction, the *Christie I* panel would have "agreed with Appellants" that PASPA would "permit Congress to 'accomplish exactly what the commandeering doctrine prohibits' by stopping the states from 'repealing an existing law.'" *Ibid.* (quoting *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring)).

Judge Fuentes, Judge Restrepo, and Judge Vanaskie dissented. Judge Fuentes, joined by Judge Restrepo, defended the excised statutory holding of *Christie I*, criticizing the majority's attempt to "infer[]" authorization by law from a repeal that did not "grant . . . permission" to anyone and left "no laws governing sports wagering" at certain locations. Pet. App. 28a, 31a. "Any other interpretation would be reading the phrase 'by law' out of the statute." *Id.* at 28a.

Judge Vanaskie dissented separately, explaining that his "skepticism" about PASPA's constitutionality—first expressed in his dissent in *Christie I*, *see* Pet. App. 178a—was "validated by today's majority opinion," *id.* at 35a. "The bedrock principle of federalism that Congress may not compel the States to require or prohibit certain activities," he wrote, "cannot be evaded by the false assertion that PASPA affords the States some undefined options." *Id.* at 36a. Under the *en banc* majority's opinion in *Christie II*, Judge Vanaskie predicted, "no repeal of any kind will evade the command that no State 'shall . . . authorize by law' sports gambling." *Id.* at 42a. This Court, he said, "has never considered Congress' legislative power to be so expansive." *Id.* at 45a.

SUMMARY OF ARGUMENT

I. PASPA's prohibition of New Jersey's 2014 Repeal violates the anti-commandeering principle and is thus unconstitutional.

A. "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability

to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162. This Court in *New York* traced the development of this principle back to the Founding. In drafting the Constitution, the Framers sought to remedy a flaw in the Articles of Confederation—that the federal government acted "only upon the States" rather than "directly upon the citizens." *Ibid.* (quoting *Lane Cty.* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868)). The Constitution "substitut[ed] a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States." *Lane Cty.*, 74 U.S. at 76. Congress thus lacks the authority to "regulate state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166.

This prohibition on Congress commandeering state governments is crucial to maintaining the "Constitution's division of authority between federal and state governments." *New York*, 505 U.S. at 175. When Congress dictates the content of state law, it undermines the responsiveness of state governments to their electorates, blurs the lines of accountability between the citizens and their state and federal governments, and disrupts the balance between those governments that protects individual liberty. *Id.* at 188; *Printz*, 521 U.S. at 922.

B. A federal ban against States repealing their own state-law prohibitions violates the anti-commandeering principle no less than a federal command to enact those prohibitions. In either case, "the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant*, 309 F.3d at 646 (Kozinski, J., concurring). That the anti-commandeering principle

applies to federal laws framed as prohibitions on state action is confirmed by this Court's precedents and amply supported by the principle's underlying values of responsiveness, accountability, and diffusion of sovereign power. It also accords with common sense; the Third Circuit itself recognized that "many affirmative commands can be easily recast as prohibitions." Pet. App. 160a.

C. Because PASPA's prohibition of the 2014 Repeal requires New Jersey to "govern according to Congress' instructions," *New York*, 505 U.S. at 162, it violates the anti-commandeering principle. PASPA not only requires States to maintain their prohibitions against sports wagering; the lower courts' injunction effectively requires New Jersey's Executive to re-impose a ban on sports wagering that no longer exists as a matter of state law. PASPA thus commandeers New Jersey's regulatory authority every bit as much as a federal command to enact a state-law prohibition in the first instance, and accordingly presents a violation of the anti-commandeering principle even more egregious than that in *New York*.

The court of appeals' conclusion that PASPA could be upheld because it "does not command states to take affirmative actions, and it does not present a coercive choice," Pet. App. 23a, is premised on the notion that PASPA allows New Jersey alternative avenues to legalize sports wagering. That contradicts the plain language and history of PASPA, which was intended to forestall further legalization of sports wagering by the States. And it ascribes to the Congress that enacted PASPA the patently absurd intention to give

States wide latitude to repeal their state-law prohibitions—even *all* such prohibitions—while at the same time prohibiting them from *licensing* the activity.

But even if one entertained the court of appeals' view that PASPA permits certain repeals that do not have too much "authorizing effect," Pet. App. 24a, that still would leave New Jersey with no realistic option to legalize sports wagering *at casinos and racetracks*. Particularly against the background that PASPA does not permit States to license sports wagering, the "option" of an undifferentiated repeal presents States not with a "choice" but "compulsion" that "runs contrary to our system of federalism." *Nat'l Fed'n of Indep. Bus. (NFIB)* v. *Sebelius*, 567 U.S. 519, 578 (2012).

The Third Circuit's efforts to draw support from this Court's other anti-commandeering cases fall flat. *South Carolina* v. *Baker*, 485 U.S. 505 (1988), and *Reno* v. *Condon*, 528 U.S. 141 (2000), each involved regulation of States under generally applicable federal laws that, unlike PASPA, did "not require the States in their sovereign capacity to regulate their own citizens." *Reno*, 528 U.S. at 151. This Court's cooperative federalism cases, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), and *FERC* v. *Mississippi*, 456 U.S. 742 (1982), are even more clearly inapposite. Cooperative federalism gives States "the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York*, 505 U.S. at 167. Because there is no system of "federal regulation" of sports wagering, States do not have the option of ceding the field to the federal government. PASPA instead gives States only the unconstitutional "choice" "to regulate pursuant to Congress'

instructions in any number of different ways." *Id.* at 176–77. That is not cooperative federalism. It is commandeering.

II. PASPA's prohibition on States repealing their own laws cannot be severed from the statute. Severability is a question of "legislative intent." *Randall* v. *Sorrell*, 548 U.S. 230, 262 (2006). It cannot be seriously maintained that Congress would have prohibited States from *licensing* or otherwise *regulating* sports wagering had it known that States, under PASPA, would be free to permit the activity; there is no reason to think that the Congress that enacted PASPA wanted to court *unregulated* sports wagering. All of Section 3702(1)'s prohibitions therefore must fall. And because Section 3702(2)'s prohibition on individual participation in sports wagering "pursuant to the law or compact" of a State is textually tethered to Section 3702(1)'s antecedent and impermissible prohibition against state "authorization by law or compact," it, too, must fall.

ARGUMENT

In *New York* v. *United States* and *Printz* v. *United States*, this Court articulated, and affirmed, a simple principle central to our system of government: "'[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts,'" or otherwise to "'regulate state governments' regulation of interstate commerce.'" *Printz*, 521 U.S. at 924 (quoting *New York*, 505 U.S. at 166). That is the anti-commandeering principle, and it is fundamental to a system of shared sovereignty.

In 2012, in response to its citizenry's urgent demands to decriminalize and regulate sports wagering, New Jersey attempted to do so in a responsible manner—through a system of licensing and close supervision of the activity. That, not coincidentally, is how Nevada currently regulates the activity, and it is what Congress had in PASPA itself imposed as a condition for legalized sports wagering in Atlantic City. In *Christie I*, the Third Circuit struck down New Jersey's regulatory regime as "licensing" and "authorization by law" prohibited by PASPA, but, in accordance with the Leagues' arguments, also held that PASPA did not "prohibit New Jersey from repealing its ban on sports wagering." Pet. App. 158a. In urging denial of the State's petition for certiorari, the United States likewise reassured this Court that New Jersey remained free to repeal its prohibitions on sports wagering "in whole or in part." JA197.

Since then, Proteus-like, the Leagues', the United States', and the lower courts' construction of PASPA has changed again and again to avoid answering the question pressed by New Jersey's citizens of what the State can do to legalize sports wagering within its borders. Indeed, the Third Circuit's current permutation—that PASPA permits States to repeal their own laws unless the repeal has too much "authorizing effect"—is so slippery that the Third Circuit itself doubted that "a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA . . . could be drawn." Pet. App. 24a. The court of appeals could not even say for sure that a repeal of prohibitions limited to "*de minimis* wagers between friends and family" would pass muster. *Ibid.* New Jersey is left to legislate in accordance with the

elusive and essentially meaningless aphorism that "not all repeals are created equal." *Ibid.*

Our Constitution does not leave the "division of authority between the Federal Government and the States" to such indeterminate vagaries. *New York*, 505 U.S. at 149. The history and structure of the Constitution and this Court's cases all establish that Congress has no power at all to require States to prohibit conduct under state law. The lower courts' injunction here demonstrates beyond cavil that *that* is what PASPA's ban on "authorization by law" does. That is unconstitutional. And because PASPA cannot function as Congress intended without its unconstitutional requirement that States take legislative and executive actions to prohibit sports wagering, the statute must be stricken in its entirety.

I. CONGRESS CANNOT PROHIBIT NEW JERSEY'S REPEAL OF ITS STATE-LAW PROHIBITIONS ON SPORTS WAGERING.

Because "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States," Congress may not "regulate state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166. This limit on congressional authority precludes the federal government from commanding States to enact state laws concerning commerce, and for all the same reasons, denies to the federal government the power to compel States to maintain such laws in effect by prohibiting their repeal. PASPA's prohibition of New Jersey's 2014 Repeal requires New Jersey to maintain in force its state-law prohibitions on sports wagering at casinos and racetracks. The lower courts' injunction

makes that plain. Congress could prohibit sports wagering itself, if it wished to do so, but it cannot compel New Jersey to do it in the service of Congress's objective of forestalling further legalization of sports wagering.

The Third Circuit reached a contrary result by limiting the anti-commandeering principle's application to cases in which Congress compels an "affirmative act" either directly, by mandating certain conduct, or indirectly, by putting States to a "coercive binary choice." Pet. App. 23a. But this Court's cases impose no such formalistic limitation on the anti-commandeering principle, and a limitation that excludes federal prohibitions of repeals of state law would be divorced from the principle's rationales of promoting responsiveness and accountability in governments and diffusion of sovereign power. In any event, by requiring New Jersey to maintain in force its state-law prohibitions against sports wagering, PASPA *is* requiring an affirmative exercise of the State's proscriptive powers. That is what PASPA does, and it is unconstitutional.

A. Congress May Not Require States To Regulate Their Citizens.

It is fair to say that very little is more central to our system of government than the division of authority between the States, as sovereigns, and the central national government, as a sovereign. In *New York* v. *United States*, this Court reviewed over two centuries of history and precedent to "ascertain[] the constitutional line between federal and state power." 505 U.S. at 155. In so doing, the Court concluded that whether

framed as a question of the scope of Congress's Article I powers or the protection of state sovereignty recognized by the Tenth Amendment, the answer is the same: "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162. Thus, "state legislatures are *not* subject to federal direction." *Printz*, 521 U.S. at 912. This fundamental understanding of the division of authority between the state and federal governments is dictated by the historical record, enshrined in our constitutional structure, and long recognized by this Court.

1. The anti-commandeering principle has its roots in the debates of the Framers on the scope of federal power under the Constitution. Under the Articles of Confederation, the federal government had acted "only upon the States" rather than "directly upon the citizens," *New York*, 505 U.S. at 162 (quoting *Lane Cty.*, 74 U.S. at 76), which was both "ineffectual and provocative of federal-state conflict," *Printz*, 521 U.S. at 919. Alexander Hamilton described this arrangement as the "great and radical vice in the construction of the existing Confederation." *New York*, 505 U.S. at 163 (citing *The Federalist No. 15*, at 108 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

At the Constitutional Convention, the Framers debated two plans—the New Jersey Plan and the Virginia Plan—to improve upon the Confederation's governmental structure. Eventually, the New Jersey Plan, which called for federal laws to be "carried into execution by the judiciary and executive officers of their respective states" was rejected. *New York*, 505 U.S. at 164. Instead, the Convention adopted the Virginia Plan, which called for Congress to "exercise its

legislative authority directly over individuals rather than over States." *Id.* at 165. The Framers' decision to relinquish control over States in favor of control over individuals was impelled by their beliefs that "a sovereignty over sovereigns, a government over governments . . . is subversive of the order and ends of civil polity," *id.* at 180 (quoting *The Federalist No. 20*, at 138 (Alexander Hamilton & James Madison) (Clinton Rossiter ed., 1961)), and that, to be effective, "[l]aws . . . must not be laid on states, but upon individuals," *id.* at 165 (citing 2 J. Elliot, *Debates on the Federal Constitution* 56 (2d ed. 1863)).

That the Constitution limited federal power in this way had been recognized long before *New York*. In 1868, the Court held that, through the Constitution, the people "substitut[ed] a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States." *Lane Cty.*, 74 U.S. at 76. And forty years later, the Court held that Congress could not properly deprive a State of the "power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose." *Coyle* v. *Smith*, 221 U.S. 559, 565 (1911) (cited in *New York*, 505 U.S. at 162). As the Court explained in *New York*, the Court had "consistently respected th[e] choice" of the Framers to adopt a Constitution that "confers upon Congress the power to regulate individuals, not States." 505 U.S. at 166.

In *New York*, this Court drew from that history and precedent what has come to be known as the anti-commandeering principle. The Court in *New York*

considered the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985. As construed by the Court, that statute gave the States the choice either to "provide for the disposal of low level radioactive waste generated within their borders" or to suffer three sets of "incentives." 505 U.S. at 168–69. The third of these incentives was a command to "tak[e] title to the waste generated within the State," thereby "becoming liable for all damages waste generators suffer as a result of the States' failure to do so promptly." *Id.* at 168–69, 174–75.

The Court considered whether either the direct command to "provide for the disposal" of the waste or the "take title" incentive, if ordered by Congress as a stand-alone measure, would be constitutional. A federal order to provide for disposal of the waste, the Court readily concluded, was simply a command to "regulat[e] pursuant to Congress' direction," and "the Constitution," the Court held, "does not empower Congress to subject States to this type of instruction." *New York*, 505 U.S. at 176. An alternative directive that the States take title to the waste would "in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers" that "would 'commandeer' state governments into the service of federal regulatory purposes." *Id.* at 175. That, too, would "be inconsistent with the Constitution's division of authority between federal and state governments." *Ibid.* Because neither alternative would be constitutional if enacted as a direct command, the Court held that Congress also "lack[ed] the power to offer the States a choice between the two." *Id.* at 176. As a result, the Court invalidated the take-title incentive.

The Court elaborated on the anti-commandeering principle five years later in *Printz*. There, the Court considered portions of the Brady Handgun Violence Prevention Act, which "command[ed] state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks." 521 U.S. at 902. The Court reaffirmed *New York*'s extensive historical analysis, observing that "'the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.'" *Id.* at 920 (quoting *New York*, 505 U.S. at 166). Accordingly, the Court explained, Congress "may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Id.* at 925.

The Court in *Printz* declined to limit the anti-commandeering principle based on the Government's proffered "distinction between 'making' law and merely 'enforcing' it, between 'policymaking' and mere 'implementation.'" 521 U.S. at 927. The Court observed that such a distinction would require it to determine how much policymaking "is too much"—a question that "is not likely to be answered precisely"—and concluded that such "an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one." *Id.* at 928. As a result, the Court held in *Printz* that just as "Congress cannot compel the States to enact or enforce a federal regulatory program," it also "cannot circumvent that prohibition by conscripting the State's officers directly." *Id.* at 935.

2. The anti-commandeering principle protects our federalist system of government—and the individual liberty that system is intended to secure—in at least three ways: First, the principle ensures that each

level of government remains responsive to the wishes of its respective constituency. Second, the principle ensures that state and federal officials remain accountable for their own conduct. Finally, the principle produces a diffusion of power across multiple sovereigns, which "reduce[s] the risk of tyranny and abuse from either." *Printz*, 521 U.S. at 921.

a. Preserving the responsiveness of each government was a central concern in *New York*. The Court acknowledged, of course, that Congress could "encourag[e] a State to conform to federal policy choices," such as by placing "'conditions on the receipt of federal funds,'" *New York*, 505 U.S. at 167, 168 (quoting *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987)), or through a cooperative federalism approach of offering "States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 167.

But under either form of encouragement, a State would remain ultimately responsive to its citizens. If Congress encourages compliance with federal programs through its spending power, a State may nonetheless "elect to decline a federal grant" if the "State's citizens view federal policy as sufficiently contrary to local interests." *New York*, 505 U.S. at 168. Similarly, under a cooperative federalism program, "state residents . . . may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program." *Ibid.* In either event, "state governments remain responsive to the local electorate's preferences." *Ibid.*

Protection of the States' responsiveness to their citizens aligns with the Framers' vision of the States

as agents of dissent, able to enact policies "unfriendly to the national government" but "generally popular in the State." *The Federalist No. 46*, at 304 (James Madison) (Clinton Rossiter ed., 1961). And indeed, in recent years, States repeatedly have responded to the wishes of their citizens by enacting policies in areas including medical marijuana, immigration, and surveillance that might be viewed as "unfriendly" to those of the national government. *See* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. Pa. L. Rev. 103, 127–29 (2012).

b. The anti-commandeering principle also serves the important purpose of ensuring that citizens know whom to hold accountable for unpopular policies. The "theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the federal government; the second between the citizens and the States." *United States* v. *Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). Where "the boundaries between the spheres of federal and state authority . . . blur," the "resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *Id.* at 577. As this Court explained in *New York*, when Congress dictates state policy, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." 505 U.S. at 169. And by foisting "the financial burden of implementing a federal regulatory program" on the States, "[m]embers of Congress can take credit for 'solving'

problems without having to ask their constituents to pay for the solutions with higher federal taxes," while the state officials may be forced to "tak[e] the blame for [a federal program's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930.

c. The anti-commandeering principle is also essential to securing individual liberty. As this Court put it, "[t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities . . . . To the contrary, the Constitution divides authority between the federal and state governments for the protection of individuals." *New York*, 505 U.S. at 181. By protecting the sovereignty of the States while also strengthening the federal government, the Framers envisioned that "[t]he different governments will control each other," allowing individual liberty to flourish. *Printz*, 521 U.S. at 922 (citing *The Federalist No. 51*, at 323 (James Madison) (Clinton Rossiter ed., 1961)). A State that can be commandeered by the federal government can provide no useful check against "'tyranny and abuse.'" *Id.* at 921 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991)).

* * *

The anti-commandeering principle is thus both simple and vital: to preserve the separate sovereignty of States—and the benefits that sovereignty provides within our federal system—Congress is limited to exercising "its legislative authority directly over individuals rather than over States." *New York*, 505 U.S. at 165. Although congressional attempts to exceed this authority are relatively new, this Court's recognition of the limits on Congress's authority is not. *Printz*,

521 U.S. at 925–26. "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162.

B. A Federal Enactment That Prohibits States From Repealing State-Law Prohibitions Violates The Anti-Commandeering Principle.

1. It is well established that Congress lacks the power to compel States to enact state laws. "[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *FERC*, 456 U.S. at 761–62. And, indeed, "no Member of the Court has ever suggested" that Congress could "command a state government to enact *state* regulation." *New York*, 505 U.S. at 178.

A federal prohibition against States' repeals of their own laws violates the anti-commandeering principle just the same. As Judge Kozinski explained in a concurrence, from the standpoint of state sovereignty, "preventing [a] state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant*, 309 F.3d at 646; *see also Wilderness Soc'y v. Kane Cty.*, 581 F.3d 1198, 1238 (10th Cir. 2009) (McConnell, J., dissenting) ("California has the right to legalize conduct for purposes of state law that the federal government makes illegal."); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1448 (2009) (arguing that distinguishing a command to enact legislation

from a prohibition on repeal of similar legislation creates an "arbitrary result"). Indeed, in *Christie I*, the Third Circuit acknowledged that a federal prohibition "stopping the states 'from repealing an existing law,'" would "permit Congress 'to accomplish exactly what the anti-commandeering doctrine prohibits,'" Pet. App. 158a (quoting *Conant*, 309 F.3d at 646)—federal regulation of "state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166.

The court of appeals nevertheless drew from this Court's focus in *New York* and *Printz* on "enact[ing]" and "enforc[ing]" legislation the notion that the anti-commandeering principle is implicated only when the federal government requires a State to perform "affirmative actions," and is not similarly implicated by a mere "prohibition" on state action. Pet. App. 20a, 23a. But this formalistic view of the anti-commandeering principle is irreconcilable with this Court's cases. Indeed, *Reno* v. *Condon* involved a federal "prohibition" that required "affirmative action" on the part of the State in order to comply, but the Court nevertheless rejected South Carolina's commandeering argument. 528 U.S. 150–51. The Court held that the commandeering analysis turned not on whether the federal law required affirmative action on the part of the State but instead on whether the federal law sought to "control or influence the manner in which States regulate private parties" and thereby "require[d] the States in their sovereign capacity to regulate their own citizens." *Ibid.*

Similarly, in *Coyle*, this Court declined to enforce a federal law providing that the location of Oklahoma's capital "shall not be changed," even though

Oklahoma's compliance with that mandate did not require any action on the part of the State. 221 U.S. at 564–65. In the Third Circuit's formulation, the federal law did not require Oklahoma to "lift a finger," Pet. App. 25a, but the Court nevertheless concluded that the federal law at issue impermissibly restricted Oklahoma's sovereignty by requiring Oklahoma to "govern a cording to Congress' instructions." *New York*, 505 U.S. at 162 (citing *Coyle*, 221 U.S. at 565).

Indeed, the Third Circuit itself in *Christie I* recognized that "many affirmative commands can be easily recast as prohibitions." Pet. App. 160a. For example, as *Christie I* explains, the background check requirement in *Printz* readily could be "recast" as a prohibition against States "issuing handgun permits unless background checks are conducted by their officials." *Ibid.* There accordingly is no basis in either law or logic for the court of appeals' confinement of the anti-commandeering principle to federal laws mandating "affirmative acts" by the States.

In any event, even if it were true that a State is not commandeered unless the federal government requires the State to perform an affirmative act, a prohibition against the repeal of a state law indisputably operates as a requirement to *maintain* that law, and "keep[ing] the prohibition on the books," Pet. App. 23a, is itself an affirmative act by the State.

The "right to do that which is not prohibited derives . . . from the inherent rights of the people." Pet. App. 7a. For a State to keep a prohibition "on the books" necessarily requires the State to employ its sovereign authority on a continuing basis to proscribe that conduct. And, state constitutions, in fact, oblige

state officers to enforce the laws that are on the books. But even if a State never takes a step to enforce its proscription, the continuing act of making conduct unlawful unquestionably is an affirmative exercise of its sovereignty.

2. Disabling Congress from prohibiting States from repealing their own laws accords with the central purpose of the anti-commandeering principle: respecting and maintaining the sovereign status of States within our federalist system and preventing them from becoming the "'puppets of a ventriloquist Congress.'" *Printz*, 521 U.S. at 928 (quoting *Brown* v. *EPA*, 521 F.2d 827, 839 (9th Cir. 1975)). And it likewise fosters the values of responsiveness, accountability, and individual liberty that the anti-commandeering principle serves to protect.

When the federal government enacts legislation in an area of concern to a State, the state government can be responsive to its citizens only so long as it retains "the ultimate decision as to whether or not the State will comply" with a federal policy choice. *New York*, 505 U.S. at 168. But where the State has no choice but to maintain a law that its citizens wish to repeal, the State is no more "responsive to the local electorate's preferences" than it would be if federal law required the State to enact in the first instance a law the electorate abhorred. *Ibid.*

Similarly, for Congress to bar States from repealing a law presents at least as great a threat to accountability as requiring States to enact a law. Whether Congress compels the enactment of a state law, or its maintenance on the books, state officials will "bear the brunt of public disapproval," *New York*,

505 at 169, while the federal government bears none of the political or economic costs of its mandate.

Finally, allowing the federal government to command the States to keep state-law prohibitions in place deeply undermines their ability to act as a check against the federal government, and thus endangers the individual liberty our federalist system is intended to secure. Indeed, a federal power to command States to maintain state-law prohibitions would be utilized principally—if not exclusively—to foreclose States' efforts to enlarge the individual liberty of their citizens.

The policies underlying the anti-commandeering principle require symmetry in the treatment of federal prohibitions against repeals of state laws and federal directives to enact them because both dictate the content of state laws. In each case, in equal measure, Congress is conscripting "state governments into the service of federal regulatory purposes," and "requir[ing] the States to govern according to [its] instructions." *New York*, 505 U.S. at 162, 175.

C. PASPA's Prohibition Of New Jersey's 2014 Repeal Violates The Anti-Commandeering Principle.

PASPA's prohibition of New Jersey's 2014 Repeal requires New Jersey to "govern according to Congress' instructions," *New York*, 505 U.S. at 162, and thus violates the anti-commandeering principle. This is demonstrated conclusively by the lower courts' injunction, which directly commands New Jersey's Executive to re-impose prohibitions the State's Legislature had repealed. And it is further confirmed by PASPA's assault on each of the values the anti-commandeering

principle serves to protect, as well as the absence of *any* similar federal laws barring States from repealing their own state-law prohibitions. The Third Circuit's contrary holding misconstrues both PASPA and this Court's cases.

1. PASPA Impermissibly Requires New Jersey To Prohibit Sports Wagering At Casinos And Racetracks.

There should be no dispute that, as construed by the Third Circuit here, PASPA prohibits New Jersey from lifting its state-law prohibitions on sports wagering at casinos and racetracks, and therefore requires New Jersey to maintain those state-law prohibitions in effect. That suffices to establish that PASPA violates the anti-commandeering principle. The federal ban on the repeal of the state-law prohibitions dictates the contents of state law no less than a federal requirement to enact the state-law prohibitions in the first instance.

Any conceivable doubt on that score is obliterated by the lower courts' injunction, which prohibits the State's Executive from "giving operation or effect" to the 2014 Repeal. Pet. App. 113a. The clear thrust of the injunction is to require the State's Executive to maintain (and presumably enforce) the state-law prohibitions on sports wagering at casinos and racetracks lifted by the 2014 Repeal. But from the moment the 2014 Repeal was enacted, as far as New Jersey law was concerned, those state-law prohibitions were "considered . . . as if [they] never existed." *Ex Parte McCardle*, 74 U.S. 506, 514 (1868); *see also* Pet. App. 30a. The injunction thus operates as a direct command to the State's Executive to re-impose the

stricken prohibitions—something "no Member of the Court has ever suggested" would be permissible in our federalist system. *New York*, 505 U.S. at 178. It requires New Jersey's Executive to use the force of his office to make sports wagering at New Jersey casinos and racetracks once again illegal, notwithstanding the absence of any state law prohibiting the conduct.

This case thus presents a more egregious violation of the anti-commandeering principle than even that in *New York*. Here, there is not only a federal statute—PASPA—that requires "the States to govern according to Congress' instructions," *New York*, 505 U.S. at 162; there also is a federal-court injunction actually dictating the contents of the State's prohibitions to ensure that they accord with those congressional instructions. And the injunction accomplishes that by conscripting the State's Executive's law enforcement authority. The Third Circuit's decision thus leaves States subject not only "to federal direction," *Printz*, 521 U.S. at 912, but, indeed, to outright federal takeover.

That cuts to the vital core of the reserved sovereignty of the States. This Court recognized in *FERC* that "the ability of a state legislative . . . body . . . to consider and promulgate regulations of its choosing" is a "quintessential attribute of sovereignty" that is "central to a State's role in the federal system." 456 U.S. at 761; *see also Printz*, 521 U.S. at 972 n.1 (Souter, J., dissenting) (the "decision on what the law should be" is "[t]he core power of a legislator"; thus "a legislator may not be ordered to exercise discretion in a particular way"). Implicit in that "quintessential attribute of sovereignty" is the "ability of a state legisla-

tive . . . body" to *withdraw* the regulations it previously had promulgated. *FERC*, 456 U.S. at 761. PASPA strips States of that ability, "damaging the legislative power as such," *Printz*, 521 U.S. at 972 n.1 (Souter, J., dissenting), and thus impairs States in their ability to fulfill their role in the "federal system" created by the Framers, *FERC*, 456 U.S. at 761.

PASPA also deeply undermines the values safeguarded by the anti-commandeering principle. The statute obviously and directly prevents New Jersey officials from being "responsive to the local electorate's preferences," *New York*, 505 U.S. at 168, because it compels them to maintain in force state-law prohibitions that New Jersey citizens—directly and through a super-majority of their elected representatives—repeatedly have expressed their desire to withdraw. Under the lower courts' injunction, New Jersey's Executive is made to look not only unresponsive, but, indeed, hostile to the citizens' wishes, as he must quixotically hold in place those prohibitions *in spite of the Legislature's repeal of those measures*. And, as if that were not enough to make New Jersey officials look unresponsive, those officials are compelled to maintain their prohibitions here against the backdrop of the Third Circuit's disingenuous claim that PASPA actually affords States ample "room . . . to craft their own policies." Pet. App. 23a.

PASPA also scrambles the lines of accountability between the people of New Jersey and their respective state and federal sovereigns by compelling New Jersey officials to maintain unwanted state-law prohibitions. Because PASPA requires these prohibitions to be maintained as a matter of *state law*, New Jersey's Executive is "put in the position of taking the blame"

from the public for the continued existence of the prohibitions and their many "defects," thereby shielding federal officials from their political costs. *Printz*, 521 U.S. at 930. Those federal officials, meanwhile, are able to curry favor with the Leagues at "no cost to the federal government." S. Rep. 102-248, at 10.

Finally, PASPA and the lower courts' injunction self-evidently diminish New Jersey's ability to provide greater individual liberty for its citizens in the area of sports wagering. But that is not all. If the federal government may convert to its own end the lawmaking function of the State, as it has done here, there can be no "diffusion of sovereign power" of the type envisioned by the Framers, and "the liberties that derive from" that diffusion undoubtedly and soon will shrivel. *New York*, 505 U.S. at 181.

That PASPA's prohibition of New Jersey's 2014 Repeal presents in such stark relief all of the evils the anti-commandeering principle guards against confirms that it is unconstitutional.

And so does the absence of any precedent for PASPA's prohibition against a State repealing its own state-law prohibitions. Like the take-title provision in *New York*, PASPA "appears to be unique." 505 U.S. at 177. In five years of litigation, neither the Leagues nor the United States has identified any other federal statute that purports to prohibit States from repealing their own state-law prohibitions—much less a federal law that has been enforced to require state officials to "give effect" to repealed state laws. That Congress has acted here in a way that is unprecedented is itself a "telling indication of [a] severe constitutional

problem." *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 505 (2010).

2. The Third Circuit's Construction Of PASPA Is Incorrect And Commandeers In Any Event.

The court of appeals did not dispute that a federal law that required States to maintain state-law prohibitions would impermissibly commandeer. But the court concluded that PASPA does not require New Jersey "to affirmatively keep the prohibition on the books" but rather permits States "to choose among many different potential policies on sports wagering." Pet. App. 23a. That holding is grounded on a manifestly incorrect construction of PASPA's prohibition on "authoriz[ation] by law" and misapprehends the scope of the anti-commandeering principle's limit on congressional power.

a. *PASPA Requires States To Maintain Their Prohibitions Against Sports Wagering.*

PASPA does not allow States "to choose among many different potential policies on sports wagering." Pet. App. 23a. Correctly construed, PASPA does not give States any choice at all; it is a direct command to States to maintain their state-law prohibitions.

The notion that PASPA permits States avenues to repeal their state-law prohibitions on sports wagering was first invented by the Leagues in 2012 as a response to New Jersey's anti-commandeering argument. Since that time, like a chameleon, the response has continually morphed to fit its surroundings. First, PASPA permitted repeals "in whole or in part,"

JA197, but as soon as the 2014 Repeal was enacted, suddenly the Leagues said only "complete deregulation" was permitted, JA100. When the United States rejected that construction, the Leagues shifted to suggesting that a State possibly could "prohibit[] some but not all forms of sports gambling," so long as the State's repeal was not a "de facto authorization." JA415–16. And now, the Third Circuit has concluded that PASPA *might* allow a repeal that permits only "*de minimis* wagers between friends and family" because such a repeal supposedly would have only limited "authorizing effect." Pet. App. 24a. So, in its current incarnation, PASPA's prohibition against "authoriz[ation] by law" permits a State to either keep in force all of its state-law prohibitions against sports wagering, repeal its prohibitions in part so long as the repeal does not have too much "authorizing effect," or repeal *all* of its prohibitions, which apparently would have no "authorizing effect" at all.

But as this Court observed in *Printz*, "[h]ow much is too much is not likely to be answered precisely; and an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one." 521 U.S. at 928. And surely a federal court's discernment of a state statute's "authorizing effect" (whatever the Third Circuit meant by that) is at least as "imprecise" as the standard of "too much" "policymaking" that this Court rejected in *Printz*. *Ibid.* As New Jersey's recent efforts to legalize sports wagering well illustrate, under the Third Circuit's "authorizing effect" standard, States have no way of knowing what prohibitions of sports wagering PASPA permits them to repeal.

But Congress did not enact such a hopelessly indeterminate statute. Far from it: PASPA prohibits

States from legalizing sports wagering, period. This is how PASPA was understood for the first twenty years of its existence. Indeed, when one of the Leagues previously sought to enforce PASPA to block Delaware's effort to expand its sports-based lottery, that League described PASPA as "bann[ing] sports betting in States that had not authorized such schemes in the past." Br. of Appellees at 2, *Office of the Comm. of Baseball* v. *Markell*, No. 09-3297 (3d Cir. Aug. 17, 2009). And before they were faced with New Jersey's commandeering challenge, the Leagues similarly described PASPA as imposing a "broad ban on sports betting." Complaint ¶ 4, *Nat'l Collegiate Athletic Ass'n* v. *Gov. of N.J.* (*Christie I*), No. 12-4947 (D.N.J. Aug. 7, 2012) (ECF No. 1).

This reading is confirmed by the statute's text. As the court of appeals observed, the word "authorize" can be defined to reach any circumstance where the legislature "permit[s] a thing to be done in the future." Pet. App. 13a (quoting Black's Law Dictionary 133 (6th ed. 1990)). Other dictionaries are in accord. *See, e.g.*, Webster's Third New Int'l Dictionary at 146 (1992) ("permit by or as if by some recognized or proper power"). That broad definition does not appear to permit *any* repeals of state-law prohibitions on sports wagering, much less a "complete repeal" of *all* state-law prohibitions on sports wagering. *See* Pet. App. 24a; *see also id.* at 71a (Fuentes, J., dissenting) ("If withdrawing prohibitions on 'some' sports wagering is the equivalent to authorization by law, then withdrawing prohibitions on *all* sports wagering must be considered authorization by law.").

This plain-language reading of PASPA's prohibition on state "authorization by law" is well supported

by PASPA's legislative history and evident purpose. The federal government's objective in enacting PASPA was to prohibit further legalization of sports wagering among the States. Indeed, the primary sponsors of the legislation described the statute as imposing a blanket ban on legalized sports wagering. *See, e.g.*, 138 Cong. Rec. S7274-02, 1992 WL 116822 (daily ed. June 2, 1992) (statement of Sen. DeConcini) ("Except for certain States, sports gaming in amateur and professional sports will be barred."); 138 Cong. Rec. S17434-01, 1992 WL 275344 (daily ed. Oct. 7, 1992) (statement of Sen. Bradley) (explaining that PASPA "prohibited" a State "from allowing sports betting"); 138 Cong. Rec. H11757 (daily ed. Oct. 5, 1992) (statement of Rep. Brooks) (describing PASPA's purpose as being to "stop the spread of *legalized gambling* on sports events") (emphasis added).

The report of the Senate Judiciary Committee likewise described the legislation as an effort to forestall the "[w]idespread *legalization* of sports gambling." S. Rep. 102-248, at 5 (emphasis added); *see also id.* at 13 (statement of Sen. Grassley) (observing that under PASPA, "three States would be granted a Federal monopoly on lawful sports wagering to the exclusion of the other 47 States"). The committee report invokes the football commissioner's worry that "*legalized* sports gambling would change . . . the way [NFL games] are perceived," the baseball commissioner's concern about "the moral status of sports gambling [being] redefined by *legalization*," and a former FBI agent's suggestion that expanded legal sports wagering might "draw new recruits to illegal gambling." *Id.* at 4, 7 (emphases added). Indeed, the brief committee

report invokes the threat of "legalized" sports gambling (or other variants of "legalize") ten separate times. *Id.* at 4–8. That preoccupation with the threat of "legalized" sports wagering seems to have been misplaced, insofar as the NFL and NHL now or soon will have teams in Las Vegas, and the commissioner of a third League has publicly announced his support for legalized sports wagering. *See* Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. Times, Nov. 13, 2014, at A27. But in any event, Congress's expressed concerns about "legalized" sports wagering are utterly irreconcilable with a legislative result that permits States to *lift all prohibitions* against sports wagering.

Yet under the counter-intuitive reading of PASPA advanced by the Leagues and adopted by the court of appeals, this statute not only permits States to withdraw all of their prohibitions on sports wagering, it also simultaneously prohibits States from "licens[ing]" that activity or regulating it in any other way that would be deemed "authorizing [it] by law." The Leagues would have the Court believe that Congress, through PASPA, was courting vast amounts of legal, but unlicensed and unregulated sports wagering. That is a bizarre intention to ascribe to a Congress that purported to be concerned about the "integrity of our national pastime." S. Rep. 102-248, at 4.

And, in fact, it is sharply at odds with another of PASPA's provisions. In the one instance in which Congress clearly permitted a State to legalize sports wagering—the one-year window New Jersey was provided to "authorize[]" sports wagering in Atlantic City—such legalization was permitted only "pursuant to a comprehensive system of State regulation authorized by that State's constitution." 28 U.S.C.

§ 3704(a)(3)(B); *see also* 138 Cong. Rec. H11757 (daily ed. Oct. 5, 1992) (statement of Rep. Hughes) (explaining that New Jersey has had a "*highly regulated*, legalized gambling industry in place in Atlantic City since 1978") (emphasis added). The text of PASPA itself thus demonstrates that where sports wagering was to be legalized, Congress intended for it to be regulated by the State. PASPA's ban on state licensing of sports wagering can be squared with that intent only if the statute also prohibits legalization of the activity by the States.

Constitutional avoidance is a powerful tool of statutory construction, but it is available only where the statute in question is ambiguous and the alternative construction is reasonably plausible. *See McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015). Here, PASPA's prohibition on "authoriz[ation] by law" is not ambiguous—it prohibits laws that permit sports wagering. The Third Circuit's construction, which necessarily permits States to completely repeal their prohibitions on sports wagering while banning States from licensing the activity, is at odds with the text, history, and evident purpose of the statute.

PASPA bans States from legalizing sports wagering, and the Third Circuit therefore was wrong to conclude that PASPA does not require New Jersey "to affirmatively keep the prohibition on the books." Pet. App. 23a.

b. *PASPA Impermissibly Commandeers Even Under The Third Circuit's Construction.*

The Third Circuit's construction would not avoid the commandeering problem here in any event. Even if it were true that PASPA allows States undefined

"room" within which they may make policy concerning sports wagering, the Third Circuit's construction makes clear that PASPA leaves New Jersey no real option to lift its prohibition on sports wagering *at casinos and racetracks*. Whatever "room" the Third Circuit's ruling might leave to States would comprise, at most, a set of federally-approved options from which States could choose. That is requiring States to govern according to Congress's instructions, which the anti-commandeering principle does not permit.

The court of appeals claimed PASPA "allows states . . . many different potential options on sports wagering that do not include . . . affirmative authorization by the State." Pet. App. 23a. But at the same time, the court of appeals construed "authorization" to bar any repeal that "channels wagering activity to particular locations or operators." *Ibid.* That does not leave New Jersey with any option to legalize sports wagering at casinos and racetracks except repeals that are unlimited in terms of "location[]" or "operator[]." That would be, in substance, a "complete repeal." Yet as the court of appeals itself seemed to recognize, putting New Jersey to the choice of maintaining its prohibition on sports wagering at casinos and racetracks or repealing prohibitions on sports wagering at any location and as to all persons is unconstitutionally "coercive." *Id.* at 25a.

Indeed, whether one calls this "option" a "complete repeal" or something else, it is obvious that is not an "option" New Jersey possibly could accept. Given that PASPA does not permit States to license sports wagering, this option would require New Jersey to permit unlicensed and essentially unregulated sports wagering to take place anywhere in the State. No

responsible government could permit that state of affairs. This is not a "hard choice." It is a Hobson's choice that "amounts in reality to coercion" to accept the federal command to maintain in place the State's prohibition. *New York*, 505 U.S. at 162; *see also Petersburg Cellular P'ship* v. *Bd. of Supervisors of Nottoway Cty.*, 205 F.3d 688, 703 (4th Cir. 2000) (the options of complying with a federal statute or withdrawing totally from regulation is "not a choice at all" and "no less coercive than the choice offered the States in *New York*"). That type of "compulsion . . . runs contrary to our system of federalism." *NFIB*, 567 U.S. at 578.

Finally, even if PASPA could be construed to offer States a cognizable choice among several potentially acceptable paths to legalize sports wagering at casinos and racetracks (none of which could have too much "authorizing effect") the statute still would impermissibly commandeer the States' regulatory authority. Unless Congress leaves States the alternative to "decline to administer the federal program," providing States a menu of regulatory schemes from which they must choose just "enables the States to regulate pursuant to Congress' instructions in any number of different ways." *New York*, 505 U.S. at 176–77.

Here, PASPA provides New Jersey no option to cede the field to federal authorities. Instead New Jersey *must* structure its state laws concerning sports wagering to meet federal requirements—either by completely prohibiting sports wagering or otherwise adopting some sort of scheme that does not have too much "authorizing effect." The "choice" presented by this strained construction of PASPA thus is precisely the type of choice that the Court struck down in *New*

York—a choice between two measures, neither of which Congress has the power to impose on a standalone basis. Since Congress can neither compel States to prohibit sports wagering, nor require them to regulate it in a particular way (without too much "authorizing effect"), giving States a choice between the two impermissible options is also impermissible. *See New York*, 505 U.S. at 176.

3. The Third Circuit's Reliance On This Court's Opinions In *Baker*, *Reno*, *Hodel*, And *FERC* Is Badly Misplaced.

The court of appeals viewed PASPA's prohibition on state "authoriz[ation] by law" as "more akin to those laws upheld in *Hodel*, *F.E.R.C.*, *Baker*, and *Reno*," than "those struck down by the Supreme Court in *New York* and *Printz*." Pet. App. 22a. Neither *Baker* nor *Reno*, which involved applications of generally applicable federal laws to a State, nor *Hodel* nor *FERC*, which involved instances of "cooperative federalism," even remotely support the Third Circuit's holding. To the contrary, they refute its reasoning at every turn.

a. *PASPA Is Not A Generally Applicable Law That Regulates States' Participation In Markets.*

The first category of cases invoked by the court of appeals to support its judgment concerned statutes it characterized as "prohibitions on state action." Pet. App. 18a (referring to *Baker* and *Reno*). The United States similarly described these cases as establishing Congress's authority to "regulate state activities." Br. of U.S. as *Amicus Curiae* at 15, *Christie* v. *Nat'l*

Collegiate Athletic Ass'n, Nos. 16-476 & 16-477 (U.S. May 2017).

The court of appeals and the United States mischaracterize *Baker* and *Reno* and misapply them to this case. In *Baker*, the Court considered the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), which the Court treated "as if it directly regulated States by prohibiting outright the issuance of bearer [i.e., non-registered] bonds" by the States. 485 U.S. at 511. The Court nonetheless upheld the statute because the relevant section of TEFRA "regulates state activities" in the same manner as a private person rather than "seek[ing] to control or influence the manner in which States regulate private parties." *Id.* at 514. While States had to engage in legislative action to issue registered bonds, the Court held that such action was "an inevitable consequence of regulating a state activity." *Ibid.* Because South Carolina effectively sought an exemption "from generally applicable federal regulations," the Court concluded the case did not present a commandeering problem. *Ibid.* (quotations omitted); *see also New York*, 505 U.S. at 160 (describing *Baker* as addressing "the authority of Congress to subject state governments to generally applicable laws").

Reno presented similar issues. Congress enacted the Driver's Privacy Protection Act of 1994 (DPPA), which "regulate[d] the disclosure and resale of personal information contained in the records of state DMVs." 528 U.S. at 143. The DPPA did "not apply solely to States," but "also regulate[d] the resale and redisclosure of drivers' personal information by private persons who have obtained that information from a state DMV." *Id.* at 146. The Court concluded that

although the statute imposed administrative burdens on the State, it did not impermissibly commandeer because "the DPPA does not require the States in their sovereign capacity to regulate their own citizens." *Id.* at 151. Instead, the Court concluded that the DPPA simply "regulates the States as the owners of data bases." *Ibid.*

This is "not a case in which Congress has subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160. Quite the contrary, PASPA's prohibitions on "licens[ing]" and "authoriz[ation] by law" apply *only* to "governmental entit[ies]." 28 U.S.C. § 3702(1). That is hardly surprising because only a government could "license" or "authorize" sports wagering "*by law*." PASPA's prohibitions on licensing and authorization by law thus are aimed squarely at "States in their sovereign capacity." *Reno*, 520 U.S. at 151. And because PASPA's prohibitions, as shown above, regulate States in the exercise of their sovereign lawmaking powers, *Baker* and *Reno* do not control this case.

b. *PASPA Does Not Implement A Cooperative Federalism Regime.*

The court of appeals also tried to draw support from this Court's cooperative federalism cases of *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.* and *FERC* v. *Mississippi*. Here again, the Third Circuit has misconstrued this Court's directions. Cooperative federalism statutes permit the States to regulate within limits set by Congress *or* to yield the field to federal regulation. PASPA, in contrast, provides no option of yielding the field to federal regulation of sports wagering; no federal regulatory scheme exists.

PASPA instead dictates continued state prohibition of sports wagering. That is not cooperative federalism.

In *Hodel*, for example, the Surface Mining Act at issue permitted "any State wishing to assume permanent regulatory authority over the surface coal mining operations on 'non-Federal lands' within its borders" to "submit a proposed permanent plan to the Secretary [of the Interior] for his approval." 452 U.S. at 271. The Act then required the Secretary to "develop and implement a federal permanent program for each State that fails to submit or enforce a satisfactory state program." *Id.* at 272. This latter option left States free to choose not "'to participate in the federal regulatory program in any manner whatsoever,'" and instead simply to leave the "'full regulatory burden'" to the federal government. *New York*, 505 U.S. at 161 (quoting *Hodel*, 452 U.S. at 288).

FERC was similar. The statute at issue there required only that States *consider* federal standards, and the Court noted that "if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals." 456 U.S. at 764. As a result, while Congress had "allowed the States to continue regulating in" an area where Congress had adopted minimum standards, it did not require the States to continue acting in that area against their will. *Id.* at 765.

PASPA does not enact a cooperative federalism regime like the statutes at issue in *Hodel* and *FERC*. While the Third Circuit described *Hodel* and *FERC* simply as cases involving "federal regulation in an otherwise preempted field," Pet. App. 20a (quotations

omitted), the defining feature of cooperative federalism is that States have "the choice of regulating that activity according to federal standards" or "simply stop[ping] regulating in the field" and ceding the field to federal regulation. *New York*, 505 U.S. at 161, 167. PASPA does not give States that "choice"; there is no federal regulatory (or deregulatory) regime of sports wagering poised to occupy the field if New Jersey were to "stop[] regulating in the field." *FERC*, 456 U.S. at 764. Quite the opposite, the central federal proscription of sports wagering looks to *state law* to determine its application and does not apply where a State has legalized the activity. *See* 18 U.S.C. § 1084(b). And that is why PASPA requires States to prohibit sports wagering.

In the absence of a choice to cede regulatory responsibility to the federal government, a federal statute that requires States to regulate according to federal standards is simply "regulat[ing] state governments' regulation of interstate commerce," *New York*, 505 U.S. at 166, which is not a "pre-emptible field," Pet. App. 19a; *see also New York*, 505 U.S. at 179 (Supremacy Clause does not provide "any authority on the part of Congress to mandate state regulation"); *see also Petersburg Cellular*, 205 F.3d at 702 (rejecting the argument that "preemption" can cover "any congressional instruction to the states" where those instructions "coopt potentially unwilling state and local legislative bodies to achieve federal policy objectives"); Mikos, *On the Limits of Supremacy*, 62 Vand. L. Rev. at 1446 (Congress's preemption power "is constrained by the Supreme Court's anti-commandeering rule"). *Hodel* and *FERC* thus offer no support for the Third Circuit's ruling.

* * *

PASPA's invalidation of New Jersey's 2014 Repeal compels New Jersey to prohibit sports wagering according to federal instruction, and unconstitutionally commandeers New Jersey's regulatory authority in the service of federal objectives. It is, therefore, unconstitutional.

II. PASPA SHOULD BE STRICKEN IN ITS ENTIRETY.

As shown above (*see* Section I.C.2.a), PASPA's impermissible commandeering cannot be avoided by construing the statute—as the Third Circuit and the United States once did—to permit States to repeal their own state-law prohibitions. That would be at war with the text of the statute and its central purpose, which is to prevent "[w]idespread legalization of sports gambling." S. Rep. 102-248, at 5. Because a court "cannot ignore the text and purpose of a statute in order to save it," *Boumediene* v. *Bush*, 553 U.S. 732, 787 (2008), PASPA's prohibition on States "authoriz[ing]" sports wagering thus cannot be salvaged by a narrow construction. And without an effective prohibition against States legalizing sports wagering, PASPA cannot function in "a manner consistent with the intent of Congress." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987). PASPA thus should be struck down in its entirety.

"'The standard for determining the severability of an unconstitutional provision is well-established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *New York*, 505 U.S. at 186 (quoting *Alaska*

Airlines, 480 U.S. at 684). But to be "fully operative as a law," it is not sufficient for the remaining provisions just to "operate in some coherent way," *NFIB*, 567 U.S. at 692; they have to work "in a manner consistent with the intent of Congress," *Alaska Airlines*, 480 U.S. at 685. Where a statute cannot "operate in the manner Congress intended," "the remaining provisions must be invalidated." *NFIB*, 567 U.S. at 692. The analysis thus is "essentially an inquiry into legislative intent." *Randall*, 548 U.S. at 262.

As shown above, the plain meaning of "authorization," PASPA's legislative history, and PASPA's neighboring prohibition on licensing all demonstrate that Congress's principal objective in enacting PASPA was to prevent States from legalizing sports wagering. Without that principal objective, there is little reason to think that Congress would have enacted any of Section 3702(1)'s ancillary prohibitions on state "sponsor[ship], operat[ion], advertis[ment], promot[ion], [and] licens[ing]." 28 U.S.C. § 3702(1). And, indeed, when a federal act's "predominant purpose" has been excised, this Court has regarded the remainder as "inseverable." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 (1999).

That would be particularly appropriate here because absent PASPA's prohibition on state *legalization*, Section 3702(1)'s remaining prohibitions would function principally to prevent States from ensuring that legal sports wagering is responsibly operated and regulated. A ban on licensing and regulation—and the necessary implication that PASPA would thereby

be channeling States toward *unregulated* sports wagering—would fly in the face of Congress's mandate of a "comprehensive system of State regulation" in the one circumstance where PASPA, as enacted, did contemplate a potential expansion of sports wagering—in Atlantic City. 28 U.S.C. § 3704(a)(3)(B). It also would be at odds with the Senate Judiciary Committee's statements that PASPA was intended to forestall "promot[ion] [of] gambling among our Nation's young people." S. Rep. 102-248, at 3–4, 5. That objective certainly would be pursued by state regulators, but is far less likely to be fulfilled in the absence of regulation. This leads inexorably to the conclusion that the ban on state licensing must fall with the unconstitutional prohibition on state authorization by law. Congress plainly would not have wanted state legalization of sports wagering without state licensing.[3]

Finally, invalidation of PASPA's prohibition on a "authoriz[ation] by law or compact" necessarily takes down the whole of Section 3702(2). Far from being severable, Section 3702(2)'s textual link to Section 3702(1)'s invalid prohibition on "authoriz[ation] by law or compact" demonstrates that it is "dependent" on the latter provision and therefore not "separable." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 313 (1936).

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[3] And if PASPA's prohibition on licensing private sports wagering schemes were stricken, Congress would not have persisted in enacting its prohibitions on state sponsorship, operation, advertisement, and promotion. These prohibitions target State-run wagering operations, prohibiting States from setting up a sports wagering scheme similar to the Delaware Sports Lottery that is exempted by PASPA. *See* 28 U.S.C. § 3704(a)(2). There is no evidence that Congress would have singled out State-run schemes *uniquely* for prohibition.

As crafted by Congress, the two prohibitions work in complementary fashion: Section 3702(1) prohibits States from legalizing sports wagering "by law or compact," and Section 3702(2) prohibits individuals from operating sports wagering schemes "pursuant to" that same "law or compact." But in the absence of Section 3702(1)'s prohibition on state authorization by law, Section 3702(2)'s prohibition against operation "pursuant to" such a state law functions not as a complement to Section 3702(1)'s prohibition, but as a nonsensical federal prohibition that permits sports wagering when prohibited by state law but prohibits such wagering when it is permitted by state law. In that circumstance, Section 3702(2) clearly would not be "operating in the manner Congress intended." *NFIB*, 567 U.S. at 692. Nothing in the text or history of PASPA evidences an intention to alter the rule set forth in 18 U.S.C. § 1084 that sports wagering is legal as a matter of federal law if it is legal in the State in which it occurs. To the contrary, PASPA commandeers state regulatory authority and requires States to maintain their state-law prohibitions precisely so Congress can claim to have "stop[ped] the spread of sports wagering" without altering the background federal rule and "at no cost to the federal government." S. Rep. 102-248, at 9.

Because the text of Section 3702(2) demonstrates that it was not intended by Congress to be a freestanding prohibition, but rather a complement to Section 3702(1)'s impermissible prohibition against state authorization by law, Section 3702(2) cannot be severed. PASPA, which has no application without Section 3702's prohibitions, should be stricken in its entirety.

CONCLUSION

To meet Congress's objective of forestalling further legalization of sports wagering, PASPA directs States to maintain in effect their state-law prohibitions on the activity. Our constitutional structure does not permit Congress to regulate interstate commerce in that manner. Indeed, PASPA reflects precisely the method of governance—"ineffectual and provocative of federal-state conflict," *Printz*, 521 U.S. at 919—that the Articles of Confederation employed but that the Constitution's Framers, after much debate, expressly rejected in favor of a federal government that could act directly upon citizens. Under our Constitution, if Congress wishes for sports wagering to be illegal, it must make the activity unlawful itself. It cannot compel States to do so. The decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

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U.S. Constitution, Amendment X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 3701 provides:

§ 3701. Definitions

For purposes of this chapter—

(1) the term "amateur sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),

(3) the term "professional sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

28 U.S.C. § 3702 provides:

§ 3702. Unlawful sports gambling

It shall be unlawful for—

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3703 provides:

§ 3703. Injunctions

A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.

28 U.S.C. § 3704 provides:

§ 3704. Applicability

(a) Section 3702 shall not apply to—

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that—

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

(4) parimutuel animal racing or jai-alai games.

(b) Except as provided in subsection (a), section 3702 shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

New Jersey P.L. 2014, c. 62 provides:

AN ACT partially repealing the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events, deleting a portion of P.L.1977, c.110, and repealing sections 1 through 6 of P.L.2011, c.231.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

C.5:12A-7 Certain provisions repealed relative to wagers on certain sports contests, athletic events.

1. The provisions of chapter 37 of Title 2C of the New Jersey Statutes, chapter 40 of Title 2A of the New Jersey Statutes, chapter 5 of Title 5 of the Revised Statutes, and P.L.1977, c.110 (C.5:12-1 et seq.), as amended and supplemented, and any rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such location or

to the operation of a wagering pool that accepts such wagers from persons 21 years of age or older situated at such location, provided that the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or operation.

As used in this act, P.L.2014, c.62 (C.5:12A-7 et al.):

"collegiate sport contest or athletic event" shall not include a collegiate sport contest or collegiate athletic event that takes place in New Jersey or a sport contest or athletic event in which any New Jersey college team participates regardless of where the event takes place; and

"running or harness horse racetrack" means the physical facility where a horse race meeting with parimutuel wagering is conducted and includes any former racetrack where such a meeting was conducted within 15 years prior to the effective date of this act, excluding premises other than those where the racecourse itself was located.

C.5:12A-8 Construction of act.

2. The provisions of this act P.L.2014, c.62 (C.5:12A-7 et al.), are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event but, rather, are intended and shall be construed to repeal State laws and regulations prohibiting and regulating the placement

and acceptance, at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such locations.

3. Section 24 of P.L.1977, c.110 (C.5:12-24) is amended to read as follows:

C.5:12-24 "Gross revenue."

24. "Gross Revenue"-- The total of all sums actually received by a casino licensee from gaming operations, less only the total of all sums actually paid out as winnings to patrons; provided, however, that the cash equivalent value of any merchandise or thing of value included in a jackpot or payout shall not be included in the total of all sums paid out as winnings to patrons for purposes of determining gross revenue. "Gross Revenue" shall not include any amount received by a casino from casino simulcasting pursuant to the "Casino Simulcasting Act," P.L.1992, c.19 (C.5:12-191 et al.).

C.5:12A-9 Severability.

4. The provisions of this act, P.L.2014, c.62 (C.5:12A-7 et al.), shall be deemed to be severable, and if any phrase, clause, sentence, word or provision of this act is declared to be unconstitutional, invalid, preempted or inoperative in whole or in part,

or the applicability thereof to any person is held invalid, by a court of competent jurisdiction, the remainder of this act shall not thereby be deemed to be unconstitutional, invalid, preempted or inoperative and, to the extent it is not declared unconstitutional, invalid, preempted or inoperative, shall be effectuated and enforced.

Repealer.

5. Sections 1 through 6 of P.L.2011, c.231 (C.5:12A-1 through C.5:12A-6) are repealed.

6. This act shall take effect immediately.

Approved October 17, 2014.

RECORD AND BRIEFS

SUPREME COURT, U.S.
OCT 16 2017
OFFICE OF THE CLERK

NOS. 16-476, 16-477

In the
Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, et al.,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,
Respondents.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

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October 16, 2017

QUESTION PRESENTED

Congress enacted the Professional and Amateur Sports Protection Act ("PASPA") to stop the spread of state-sponsored sports gambling. PASPA prohibits states from operating a sports-gambling scheme themselves, prohibits private individuals from conducting such schemes in the states' stead, and preempts state laws authorizing or licensing such conduct. The question presented is whether PASPA commandeers the states.

PARTIES TO THE PROCEEDING

Petitioners, who were appellants below, are Christopher J. Christie, as Governor of the State of New Jersey; David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; Frank Zanzuccki, Executive Director of the New Jersey Racing Commission; Stephen M. Sweeney, President of the New Jersey Senate; Vincent Prieto, Speaker of the New Jersey General Assembly; and the New Jersey Thoroughbred Horsemen's Association, Inc. The New Jersey Sports and Exposition Authority was a defendant in the district court.

Respondents, who were appellees below, are the National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League, and the Office of the Commissioner of Baseball.

CORPORATE DISCLOSURE STATEMENT

Respondents are the National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League, and the Office of the Commissioner of Baseball. None of the respondents has a parent company. No publicly held company owns 10% or more of any respondent's stock.

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INTRODUCTION

This case involves a straightforward application of the Supremacy Clause. The Professional and Amateur Sports Protection Act ("PASPA") does not force states to enact any federally-prescribed legislation or to enforce any federal regulatory regime. PASPA does prevent states from operating sports gambling schemes, like sports-based lotteries, and it does prevent states from authorizing third parties to operate such schemes in their stead. But that preemption of state action and state law that interferes with federal policy is unproblematic—indeed, commonplace—and far removed from the two statutory provisions that this Court has found to commandeer the states. PASPA does not compel states (or anyone else, for that matter) to do anything. Indeed, New Jersey complied with PASPA for two decades without doing anything at all. This case therefore lacks the irreducible minimum of any successful commandeering claim—namely, an affirmative command that states enact or implement federal law.

The notion that PASPA commandeers the states was invented 20 years after its enactment, when New Jersey intentionally violated PASPA so that it could challenge its constitutionality. After courts rejected that challenge up and down the line, the legislature passed a new law purporting to "repeal" the state's sports gambling prohibitions, but only for sports-gambling schemes provided under conditions of the state's choosing—*i.e.*, at state-licensed casinos and racetracks, by casino and racetrack patrons 21 years or older, and on only athletic contests that do not

involve a New Jersey college team or a collegiate event taking place in New Jersey. As the overwhelming majority of the *en banc* Third Circuit recognized—and as petitioners no longer dispute—that effort to channel the state's preferred forms of sports gambling to the state's hand-picked venues for lawful gambling was an authorization dressed up as a "partial repeal" and ran afoul of PASPA.

New Jersey contends that PASPA violates the anti-commandeering doctrine because it requires New Jersey to maintain its pre-existing prohibitions on sports gambling. But PASPA does no such thing. In fact, PASPA contains no affirmative command of any kind. It does not require states to maintain, enact, enforce, or *do* anything. Instead, under PASPA states must simply refrain from taking certain actions, *i.e.*, from operating sports-gambling schemes or from authorizing third parties to do so in their stead.

For example, PASPA prohibits a state from sponsoring or operating a sports lottery, or from authorizing or licensing a third party to do so. Such efforts are unlawful under, *i.e.*, preempted by, PASPA. But as long as the state refrains from undertaking or authorizing a sports lottery, it does not run afoul of PASPA. If a state had a pre-PASPA prohibition on sports lotteries on its books, it is free to maintain it, repeal it, or enhance it without running afoul of PASPA. Of course, if the state tries to engineer a clever "partial repeal" of the prohibition in an effort to authorize a hand-picked third party to operate a sports lottery, that "partial repeal" will run afoul of and be preempted by PASPA. But so long as a state refrains from authorizing a third party to offer a

forbidden sports lottery, it is free to alter its prohibitions as it sees fit. That is the ordinary and appropriate operation of the Supremacy Clause and bears no resemblance to anything this Court has ever identified as a commandeering problem.

At the end of the day, New Jersey's real complaint is that Congress has forbidden it from enacting the specific policy it prefers—namely, state-sponsored sports gambling at its state-licensed casinos and racetracks. And make no mistake, Congress has done that. But Congress does not commandeer the states just because it limits their policy options, and nothing in the Tenth Amendment prevents Congress from using its commerce power to preempt state laws that contravene federal policy. The difference between permissible preemption and impermissible commandeering is that the former *precludes* certain state action, while the latter *commands* it. PASPA falls comfortably in the former, permissible camp.

STATEMENT OF THE CASE

A. Federal Regulation of Gambling

Congress has long recognized and sought to contain the harms that can flow from various forms of gambling. In doing so, Congress has often deferred to state judgments as to what types of gambling should be allowed in that state, but it has intervened when necessary to "prevent interference by one State with the gambling policies of another" and "to protect identifiable national interests." 15 U.S.C. §3001(a)(2).

For instance, although Congress has generally left it to the states to decide whether to offer lotteries, when some states began to outlaw them, Congress passed a prohibition on the use of the mails to conduct

lotteries in an effort to help states prevent their own anti-gambling policies from being thwarted by the availability of gambling in other states. *See N.Y. State Broads. Ass'n v. United States*, 414 F.2d 990, 995 (2d Cir. 1969). By "supplement[ing] the action of those states ... which, for the protection of the public morals, prohibit the drawing of lotteries ... within their respective limits," Congress not only prevented one state from using interstate commerce to interfere with the policy choices of another, but also promoted the national interest of "guarding the people of the United States against the 'widespread pestilence of lotteries.'" *Champion v. Ames*, 188 U.S. 321, 357 (1903).

In the 1950s and 1960s, Congress put in place anti-gambling measures to fight the scourge of organized crime. The Interstate Wire Act of 1961, for example, included sweeping new prohibitions on the use of wire communications for interstate or foreign transmission of (1) bets or wagers on sporting events; (2) information assisting in the placement of such bets or wagers; and (3) communications entitling the recipient to receive money for such bets or wagers. 18 U.S.C. §1084(a). Congress provided a limited accommodation to states that permitted sports gambling by exempting "the transmission of *information* assisting in the placing of bets" on sporting events from a state where betting is legal into a state where such betting is also legal. *Id.* §1084(b) (emphasis added). But that exemption does not "permit the transmission of bets and wagers" themselves (as opposed to information supporting them) "from or to any State whether betting is legal in

that State or not." *United States v. McDonough*, 835 F.2d 1103, 1105 (5th Cir. 1988).

The Organized Crime Act of 1970 took federal anti-gambling measures a step further, creating new criminal prohibitions that apply directly to gambling businesses. Pub. L. No. 91-452, §801, 84 Stat. 922 (1970). The act makes it unlawful to conduct an "illegal gambling business," which is defined, in part, by whether the business violates state or local law. 18 U.S.C. §1955(b)(1)(i). The Act also makes it a federal crime to obstruct state or local law enforcement "with the intent to facilitate an illegal gambling business." *Id.* §1511(a).

Congress has enacted several statutes specifically aimed at curtailing gambling on professional and amateur sports. As noted, the Wire Act's prohibitions expressly apply to sports gambling, *id.* §1084(a), and three years after passing the Wire Act, Congress made it a federal crime to fix or attempt to fix any sports contest, *id.* §224. The House Report declared such offenses "a challenge to an important aspect of American life—honestly competitive sports." H.R. Rep. No. 88-1053, at 2 (1963). And when Congress exempted state-run lotteries from the federal prohibitions on using interstate commerce to facilitate lotteries, it excluded state-sponsored sports lotteries from that exemption, making clear that federal laws would continue to apply to "placing or accepting of bets or wagers on sporting events or contests" even when conducted by states. *See* 18 U.S.C. §1307(d).

More recently, Congress enacted the Unlawful Internet Gambling Enforcement Act ("UIGEA"), which prohibits internet gambling as a matter of

federal law unless the state in which it is conducted has in place certain federally-specified constraints. 31 U.S.C. §5362(10). Accordingly, under UIGEA, which applies to sports gambling, internet gambling that is lawful under state law may nonetheless violate federal law.

B. The Professional and Amateur Sports Protection Act

In 1990, amid growing public concern about the potential harms of sports gambling, Congress began considering federal legislation to stem the spread of state-sponsored gambling on professional and amateur sports. Although only a handful of states had actually authorized any form of sports gambling, various states were considering authorizing sports-gambling schemes to be conducted on riverboats or in off-track betting parlors and casinos; others were debating introducing sports themes into their lotteries. *See* 137 Cong. Rec. S2256 (Feb. 22, 1991) (statement of Sen. DeConcini).

After a robust debate and extensive hearings, Congress concluded that although "sports gambling offers a potential source of revenue," "the risk to the reputation of one of our Nation's most popular pastimes, professional and amateur sporting events, is not worth it." S. Rep. No. 102-248, at 7 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3558. "Sports gambling threatens to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling," "undermines public confidence in the character of professional and amateur sports," and "will promote gambling among our Nation's young people." *Id.* at 5. The Senate Report noted that

"[w]ithout Federal legislation, sports gambling is likely to ... develop an irreversible momentum," and singled out as an example "pressures in such places as New Jersey ... to institute casino-style sports gambling." *Id.*

On October 28, 1992, the President signed into law PASPA, which was approved by a vote of 88-5 in the Senate and by voice vote in the House. *See* 28 U.S.C. §3701 *et seq.*[1] PASPA was not designed to eliminate any and all sports gambling. Instead, the statute specifically targets state-sponsored sports-gambling sc*hemes*—in other words, organized markets for sports gambling—whether operated by the state or by a third party licensed or authorized by the state.

To that end, PASPA's first set of prohibitions makes it "unlawful for" any "governmental entity" (*i.e.*, the state itself) to "sponsor, operate, advertise, promote, license, or authorize by law or compact ... a lottery, sweepstakes, or other betting, gambling, or

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[1] Contrary to petitioners' suggestion, NJ.Br.6, Congress did not enact PASPA over constitutional objections from the Justice Department. Instead, DOJ's only objection pertained to "overbreadth and ambiguity" concerns about the definition of the term "lottery" in an earlier version of the legislation—a concern that DOJ suggested could be addressed simply by "more fully defin[ing]" the term, which Congress ultimately did. Pet.App.225. While DOJ also suggested that PASPA "raises federalism issues," the only such issue it identified in its opinion letter was a *policy* concern that PASPA would limit the states' ability to use sports gambling to raise revenue. This Court has subsequently clarified, unanimously, that laws that prohibit states from pursuing potentially lucrative revenue-raising opportunities raise no commandeering concerns. *See, e.g., Reno v. Condon*, 528 U.S. 141 (2000).

wagering scheme based" on an amateur or professional sporting event. *Id.* §3702(1). PASPA thus precludes states from sponsoring or operating their own sports-gambling schemes, from advertising or promoting sports-gambling schemes, and from licensing or authorizing third parties to run sports-gambling schemes in their stead.

PASPA's second set of prohibitions are directed at private parties, making it "unlawful for ... a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity," any sports-gambling scheme. *Id.* §3702(2). The law thus not only precludes the state from operating or authorizing a sports-gambling scheme, but also prevents a third party from operating a sports-gambling scheme pursuant to state law.

To promote PASPA's federal policy against state-sponsored sports-gambling schemes without resorting to federal "criminal prosecutions of State officials" or private parties, S. Rep. 102-248, at 6 (1991), Congress granted the Attorney General authority to enforce PASPA's prohibitions through civil suits for injunctions. 28 U.S.C. §3703. PASPA also provides professional and amateur sports organizations with a cause of action to seek to enjoin a PASPA violation when the organization's own "competitive game is alleged to be the basis of such violation." *Id.*

To accommodate the reliance interests of the handful of states that already had authorized some sports-gambling schemes, PASPA exempts from its prohibitions state-authorized sports-gambling schemes that pre-dated PASPA's enactment. *Id.* §3704(a)(1)-(2). PASPA likewise exempts "parimutuel

animal racing" and "jai-alai games" from its reach. *Id.* §3704(a)(4). PASPA also includes a special exemption specifically crafted for New Jersey, which flatly prohibited sports gambling at the time but had authorized and licensed extensive non-sports gambling at casinos in Atlantic City. Under this exemption, New Jersey was given until "one year after [PASPA's] effective date" to "authorize[]" sports-gambling schemes to be "conducted exclusively in casinos" in Atlantic City "pursuant to a comprehensive system of State regulation authorized by that State's constitution." *Id.* §3704(a)(3).

New Jersey chose not to avail itself of PASPA's one-year window. In fact, the state legislature declined even to vote on a resolution that would have allowed a referendum on a constitutional amendment authorizing sports gambling at casinos. *See In re Pet. of Casino Licensees for Approval of a New Game, Rulemaking & Authorization of a Test*, 633 A.2d 1050, 1051 (N.J. Super. Ct. App. Div.), *aff'd*, 647 A.2d 454 (N.J. 1993) (per curiam). Instead, New Jersey continued to flatly prohibit sports gambling for the next two decades. *See, e.g.*, N.J. Stat. Ann. §2a:40-1 ("All wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event, shall be unlawful."). The New Jersey Constitution likewise continued to prohibit the legislature from authorizing wagering on the results of any professional, college, or amateur sports other than horse racing. *See In re Casino Licensees*, 633 A.2d at 1054.

C. New Jersey's Relentless Efforts to Get Sports-Gambling Schemes Into Its Casinos and Racetracks

In recent years, New Jersey has come to regret its decision not to avail itself of the option to authorize its casinos to provide sports gambling back in 1993, and has undertaken a series of efforts to get out from under PASPA's prohibitions.

The state began by amending its constitution to eliminate its historical prohibition on sports gambling and to permit the legislature "to authorize by law wagering ... on the results of any professional, college, or amateur sport or athletic event," except for certain New Jersey-related collegiate events. N.J. Const. art. IV, §VII, ¶2D. New Jersey then enacted the Sports Wagering Law, N.J. Stat. Ann. §5:12A-1, *et seq.* (West 2012) (the "2012 Law"), which authorized Atlantic City casinos and horse racetracks throughout the state to engage in "the business of accepting wagers on any sports event by any system or method of wagering." *Id.* §§5:12A-1, 5:12A-2. Consistent with its amended constitution, New Jersey exempted from this authorization the athletic events of its own colleges and universities, as well as any collegiate events taking place in New Jersey, thus shielding these local interests from the negative effects of the sports gambling it authorized. *Id.* §5:12A-1. The Division of Gaming Enforcement, which was charged with regulating and issuing licenses for the sports gambling that the law authorized, *id.* §§5:12A-2, 5:12A-4, then promulgated regulations pursuant to the 2012 Law. N.J. Admin. Code §13:69N.

New Jersey did not claim that the 2012 Law and implementing regulations were somehow compatible with PASPA. Instead, New Jersey acknowledged the unambiguous conflict with federal law, and the governor declared, "if someone wants to stop us, then they'll have to take action to try to stop us." App.118, *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) ("*Christie I*").

The National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the Commissioner of Baseball (collectively, "respondents") took up the charge, bringing suit under §3703 of PASPA. New Jersey responded by conceding that its 2012 Law violated PASPA but arguing that PASPA is unconstitutional because, among other things, it commandeers the states. The United States intervened to defend PASPA's constitutionality, and the district court and the Third Circuit thoroughly rejected New Jersey's argument and enjoined New Jersey from enforcing the 2012 Law and regulations. *See Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013), *aff'd*, *Christie I*, 730 F.3d 208.

After the Third Circuit denied their *en banc* petitions, petitioners sought this Court's review. Before the Court could act, however, the legislative sponsors of the 2012 Law announced that they had no intention of letting the courts stand in the way of their plans to authorize sports gambling at New Jersey's casinos and racetracks. As State Senator Raymond Lesniak put it, no matter what the outcome before the Court, "we will push the envelope on sports betting."

JA122. To that end, he vowed that if this Court did not revive the 2012 Law, he would introduce new legislation that, once again, would "allow casinos and racetracks to have sports betting." *Id.*

This Court denied the petitions. *See Christie v. Nat'l Collegiate Athletic Ass'n*, 134 S. Ct. 2866 (2014). Three days later, the New Jersey legislature made good on Senator Lesniak's promise and passed Senate Bill 2250, 216th Leg., 1st Sess. (N.J. 2014) ("S2250"). S2250 purported to "repeal" the state's existing prohibitions on sports wagering, but *only* "to the extent they would apply to such wagering at casinos or gambling houses in Atlantic City or at current running and harness racetracks in this State." S2250. S2250 thus purported to "repeal" the prohibitions only as applied to sports-gambling schemes run by state-licensed and state-regulated commercial gambling venues. As Senator Lesniak explained, S2250 would—like the invalidated 2012 Law before it—"put [sports gambling] in the regulated hands of existing casino and racetrack operators." JA125. Governor Christie vetoed that unabashed effort to undo *Christie I*, describing it as a "novel attempt to circumvent the Third Circuit's ruling" and to "sidestep federal law." JA128. Emphasizing that "the rule of law is sacrosanct" and "binding on all Americans," the Governor refused to sign off on the legislature's transparent effort to "[i]gnor[e] federal law." JA128.

Two months later, the Governor saw things differently. On October 17, 2014, he signed into law Senate Bill 2460, 216th Leg., 1st Sess. (N.J. 2014) (the "2014 Law"), which was also sponsored by Senator Lesniak. As one of his co-sponsors candidly

acknowledged, the 2014 Law was yet another attempt to achieve the same thing as the invalidated 2012 Law—namely, to "implement well regulated sports gaming" in New Jersey's casinos and racetracks. JA314.

The 2014 Law authorizes and licenses sports gambling in the same manner as the vetoed S2250—*i.e.*, by purporting to "repeal" existing prohibitions on provision of and participation in sports-gambling schemes, but *only* "to the extent they apply ... at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State." N.J. Stat. Ann. §5:12A-7. This "partial repeal" applies, moreover, *only* to sports-gambling schemes that confine betting to "persons 21 years of age or older situated at such location," and to sporting events other than "a collegiate sport contest or collegiate athletic event that takes place in New Jersey or ... in which any New Jersey college team participates regardless of where the event takes place." *Id.* In short, the 2014 Law, like the 2012 Law before it, ensured that sports-gambling schemes would be operated only by state-licensed gambling venues, and offered only to specified persons and on specified sporting events.

D. Proceedings Below

1. Respondents responded by filing this lawsuit asking the district court to enjoin New Jersey's latest effort to "authorize" and "license" sports gambling in violation of PASPA. In addition to the same state defendants named in *Christie I*, respondents named as defendants the New Jersey Thoroughbred Horsemen's Association ("NJTHA"), which operates Monmouth

Park Racetrack and announced within mere hours of the 2014 Law's signing its intent to "begin offering and accepting wagers on sporting contests and athletic events" within the week, JA119; as well as the New Jersey Sports and Exposition Authority ("NJSEA"), the state instrumentality that owns Monmouth Park (and other state-sponsored gambling venues). The complaint sought to enjoin the state petitioners and NJSEA from violating §3702(1) of PASPA and to enjoin NJTHA from violating §3702(2).

Petitioners refused to hold off on initiating sports gambling, even for a few weeks, to give the district court time to consider the legality of the 2014 Law, and so respondents sought a temporary restraining order. The district court granted that order and, after additional briefing and a hearing in which the United States participated as an *amicus* (because PASPA's constitutionality was not directly challenged), permanently enjoined New Jersey from "giving operation or effect" to the 2014 Law. Pet.App.113. Although the court acknowledged that New Jersey "carefully styled the 2014 Law as a repeal," Pet.App.107, it concluded that the law is in substance an authorization, recognizing that "'the Supremacy Clause is not so weak that it can be evaded by mere mention of [a] word,' ... '[or] by formalism,' which would only 'provide a roadmap for States wishing to circumvent' federal law." Pet.App.106 (quoting *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 382-83

(1990) & *Haywood v. Drown*, 556 U.S. 729, 742 & n.9 (2009)).[2]

2. Petitioners again appealed to the Third Circuit, which held that the 2014 Law, like the 2012 Law before it, violated PASPA. Pet.App.60. As the court explained, "by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling," "the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited." Pet.App.60-61. The court noted that the 2014 Law is at odds with PASPA's exception allowing New Jersey to authorize sports-gambling schemes at its casinos within one year of PASPA's enactment, explaining that Congress could not plausibly have intended to allow New Jersey belatedly to accomplish through a dubiously labeled "partial repeal" the same result that PASPA gave it only one year to adopt. Pet.App.62-63.

Judge Fuentes, the author of *Christie I*, dissented, maintaining that the 2014 Law does not violate PASPA because a law styled as a repeal—whether "partial" or otherwise—is not an "authorization." Pet.App.67.

3. The Third Circuit agreed to hear the case *en banc*. In a 9-3 decision, the court rejected petitioners' argument that the 2014 Law does not violate PASPA, as well as their revived argument that PASPA unconstitutionally commandeers the states.

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[2] Having enjoined New Jersey from giving operation or effect to the 2014 Law, the court found no need to resolve respondents' claims against NJSEA and NJTHA. Pet.App.110a.

The court began by agreeing with the panel majority that the 2014 Law "authorized" sports-gambling schemes in violation of PASPA. Rejecting petitioners' argument that a law labeled a "repeal" cannot be an authorization, the court explained that "the presence of the word 'repeal' does not prevent us from examining what the provision actually does." Pet.App.14. And "[w]hile artfully couched in terms of a repealer, the 2014 Law essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling. This is an authorization." Pet.App.14.[3]

The court then rejected petitioners' reprise of their argument that PASPA unconstitutionally commandeers the states. The court first reiterated, as the panel held in *Christie I*, that the commandeering doctrine has never been understood to apply "where the states were not compelled to enact laws or implement federal statutes or regulatory programs." Pet.App.19. After examining this Court's preemption and commandeering cases in exhaustive detail, the court found PASPA "more akin to those laws upheld" by this Court than to the two unusual laws struck down in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). Pet.App.22. The court found it enough for constitutional purposes that PASPA "does not

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[3] Having concluded as much, the court declined to address respondents' (and the United States') additional argument that, by confining sports gambling to state-licensed gambling venues, the law licenses sports-gambling schemes in violation of PASPA. Pet.App.16a n.7.

require ... the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law." Pet.App.25 (quoting *Christie I*, 730 F.3d at 231). "Put simply, PASPA does not impose a coercive either-or requirement or affirmative command." Pet.App.25.

In reaching that conclusion, the court rejected petitioners' argument that "if the legislature cannot repeal New Jersey's prohibition as it attempted to do in the 2014 Law, then it is required to affirmatively keep the prohibition on the books." Pet.App.22-23. As the court explained, the mere fact "[t]hat a specific partial repeal which New Jersey chose to pursue in its 2014 Law is not valid under PASPA does not preclude the possibility that other options may pass muster." Pet.App.24. Accordingly, while the court saw no need to "articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA," it declined to accept the proposition "that PASPA presents states with a strict binary choice between total repeal and keeping a complete ban on their books." Pet.App.24.

Judge Fuentes, joined by Judge Restrepo, dissented again, reasoning that a repeal is not an "authorization" under PASPA. Pet.App.27-34. Judge Vanaskie, the lone dissenter in *Christie I*, also continued to dissent, reiterating his view that PASPA effectively requires states to maintain sports-gambling prohibitions in violation of the commandeering doctrine because there is no workable "distinction between repeal and authorization." Pet.App.46.

E. New Jersey's Proposed Abandonment of the Regulation of Sports Gambling

Less than three months after the *en banc* court's decision, New Jersey legislators introduced a bill that would "remov[e] and repeal[] all prohibitions, permits, licenses, and authorizations concerning sports wagering" in the state. G.A. A4303, 217th Leg. (2016). The bill's statement sets forth the sponsors' view that the new law would not run afoul of the Third Circuit's decisions because it would be a "total repeal." *Id.* In May 2017, Dennis Drazin, who has served as an advisor to NJTHA during this litigation, JA235, asserted that he had spoken with numerous state legislators and declared that "[w]e're moving forward with the full repeal." Stephen Edelson, *Monmouth Park set to use sports betting 'Nuclear Option'*, Asbury Park Press, May 25, 2017, http://on.app.com/2hKWY5k. Senator Lesniak then introduced in the New Jersey Senate a bill that "would totally remove and repeal the State's prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events." G.A. S3375, 217th Leg. (2017). That bill and the similar bill in the General Assembly have both been referred to committee.

SUMMARY OF ARGUMENT

While PASPA requires states to refrain from engaging in certain conduct and from embracing certain policies, it does not force them to adopt federally-prescribed policies or to enforce federal law. Put differently, PASPA preempts but does not commandeer. The distinction is critical. Federal preemption of state law is both permissible and

commonplace, and it does not cross any constitutional line just because it prevents states from achieving their preferred policy objectives. Commandeering, by contrast, is impermissible but arises only when Congress goes beyond precluding state action and affirmatively commands it.

That is a very rare thing. Indeed, this Court has found a commandeering problem in a grand total of two cases. In both of those cases, the challenged law told states what they *must do* instead of what they *must not do*. In *New York*, Congress told states they must adopt federal standards for disposal of radioactive waste; in *Printz*, Congress told states they must run federal background checks. But in both cases the Court was at pains to distinguish those rare *thou shalt* commands from the commonplace dynamic in which Congress tells states *thou shalt not* have laws inconsistent with federal policy. And as those cases, the cases before them, and the cases after them all make clear, without that type of affirmative *command* to enact or implement federal policy, there is no *command*eering; instead, there is just ordinary preemption.

Implicitly recognizing that critical distinction between preemption and commandeering, New Jersey insists that PASPA is unconstitutional because it purportedly commands states to maintain their existing, pre-PASPA prohibitions against sports gambling on their statute books. The problem with that argument—as every court to consider it has recognized—is that PASPA does no such thing. As is clear on its face, PASPA does not require states to maintain existing prohibitions against sports

gambling. Indeed, PASPA does not require states to enact, maintain, consider, enforce, or *do* anything. Instead, the statute sets forth only what states (and private parties) may *not do*—*i.e.*, take action inconsistent with the federal policy against state-sponsored sports-gambling schemes.

More concretely, a state may not sponsor or operate a sports-gambling scheme, like a sports-based lottery. Nor may a state authorize or license a third party to sponsor or operate such a scheme. And neither a state nor a third party may advertise or promote such a scheme, whether state-operated or state-authorized. That is it. All a state must do to comply with PASPA is abide by those prohibitions. If a state already prohibits sports-gambling schemes, it can leave its prohibitions intact, but it can also repeal or enhance them without running afoul of PASPA. To be sure, a state cannot "partially repeal" a general prohibition for only one or two preferred providers, or only as to sports-gambling schemes conducted by the state, for PASPA's prohibitions are not that easily evaded. But the notion that PASPA compels states to keep existing sports gambling prohibitions in place is a fiction—and a fiction on which petitioners' argument critically depends.

Petitioners thus are ultimately reduced to arguing that PASPA commandeers New Jersey not because it compels New Jersey to do anything, but because it prevents New Jersey from effectuating the specific policy it prefers—*i.e.*, from authorizing sports gambling at its state-licensed casinos and racetracks. But while PASPA certainly does prevent that, that is nothing but the appropriate and unremarkable

consequence of the Supremacy Clause. Congress does not commandeer the states just because it limits their options, and the Tenth Amendment does not require Congress to let states override its policy decisions in areas that concededly fall within Congress' enumerated powers.

In all events, even if there were a constitutional problem with PASPA's prohibition on states "authorizing" sports-gambling schemes, PASPA's remaining unchallenged prohibitions would still constitutionally prohibit New Jersey's casinos and racetracks from offering sports-gambling schemes pursuant to the 2014 Law. PASPA prohibits not only state action inconsistent with federal policy, but private action as well. And petitioners do not have a constitutional argument as to *most* of the prohibitions on state conduct or *any* of the prohibitions on private conduct. Section 3702(1)'s provisions making it unlawful for a state itself to "sponsor, operate, advertise, [or] promote" a sports-gambling scheme are an unquestionably permissible regulation of states as participants in the sports-gambling market. And petitioners have never suggested that there is any constitutional problem with §3702(2), which prohibits private parties from sponsoring, operating, advertising, or promoting sports-gambling schemes pursuant to state law. Together, those provisions suffice to ensure that third parties cannot execute the state-authorized sports-gambling schemes envisioned by the 2014 Law (or the 2012 Law) regardless of whether PASPA validly preempts the state laws directly.

Not only does that underscore that Congress plainly would have wanted the balance of PASPA to remain intact with or without the challenged authorization prohibition in §3702(1); it also underscores that PASPA was never about commandeering the states. Instead, the statute is nothing more than an attempt to achieve the permissible and commonplace objective of preempting state laws that override the federal policy against having the states or their authorized agents operating state-sponsored sports-gambling schemes.

ARGUMENT

I. PASPA Does Not Commandeer The States.

A. The Anti-Commandeering Doctrine Prohibits Only Laws that Compel States to Enact or Administer Federal Policy.

Countless federal laws preempt state laws, sometimes by supplanting them with detailed federal regulations, sometimes by expressing a federal preference for deregulation, and sometimes by prohibiting conduct that states might otherwise want to engage in or authorize. All of those laws constrain states' legislative options and preclude policies that states could otherwise pursue. But none of that raises a constitutional red flag, or even a yellow one. Commandeering concerns arise only when, rather than *constraining* states by taking certain state policy options off the table, Congress imposes affirmative duties that *compel* states to do its bidding. This Court's commandeering cases (not to mention the very name of the doctrine) make that crystal clear.

The first case in which this Court identified a commandeering violation was *New York*. That case

involved a provision of the Radioactive Waste Policy Amendments Act that required states either to take title to radioactive waste or to regulate that waste pursuant to Congress' direction. The fatal flaw in that provision was that it did not give states the option of doing *nothing*. The only two available options both commandeered the states "by *directly compelling* them to enact and enforce a federal regulatory program," either through the executive action of taking title or through the legislative action of enacting federally-specified state legislation. 505 U.S. at 161 (emphasis added). Either option required affirmative action by the state, so confining states to those two options was unconstitutional. *Id.* at 188.

The second commandeering case, *Printz*, involved a provision of the Brady Handgun Violence Protection Act that required state law enforcement officers to perform federal background checks on prospective firearm buyers. Like the law in *New York*, the fundamental defect with this aspect of the Brady Act was that states had no option of doing nothing; the law directed them to take affirmative action. Congress, the Court reiterated, "may not compel the States to implement, by legislation or executive action, federal regulatory programs." 521 U.S. at 925. By requiring state and local law enforcement officers to conduct federally-mandated background checks, the Brady Act unconstitutionally conscripted state law enforcement officers into federal service. *Id.* at 935.

The laws at issue in *New York* and *Printz* both entailed an extraordinary type of command: an "unambiguous" directive requiring the states to *do something*—to take affirmative executive or

legislative action to administer federal regulation or enact federally-specified legislation. *Id.* at 926. Indeed, this Court emphasized in both cases that such a "thou must do X" direction to the states was essentially unprecedented. *Id.*; *see also New York*, 505 U.S. at 177. As those two cases reflect, the commandeering doctrine embodies two related—and limited—principles: The federal government "cannot compel the States to enact or enforce a federal regulatory program," and it "cannot circumvent that prohibition by conscripting the State's officers directly." *Printz*, 521 U.S. at 935.

Nothing about those two principles imperils the ordinary operation of the Supremacy Clause. *See, e.g.*, *Printz*, 521 U.S. at 913. Both before and after *New York* and *Printz*, this Court has rejected the notion that federal statutes that preclude states from engaging in certain activity, or permit them to do so only subject to certain conditions, commandeer the states. For instance, in *South Carolina v. Baker*, 485 U.S. 505 (1988), the Court held that Congress may prohibit states from issuing unregistered bonds, even if that federal constraint would require states that wanted to issue bonds to "amend a substantial number of statutes" and "devote substantial effort to determine how best to implement a registered bond system." *Id.* at 514. Likewise, in *Reno v. Condon*, 528 U.S. 141 (2000), this Court held that a federal law prohibiting states from engaging in the profitable practice of disclosing drivers' license information to certain third parties does not commandeer the states just because it requires "time and effort on the part of state employees" to make sure that any disclosures comply with federal law. *Id.* at 150-51.

The anti-commandeering doctrine likewise does not call into question the countless federal laws that displace contrary state law—whether by supplying detailed federal regulations, *see, e.g.*, *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992) (considering Occupational Safety and Health Act, which preempts "state laws regulating the same issue as federal laws"), or by expressing a federal preference for deregulation, *see, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992) (considering Airline Deregulation Act, which precludes "States from prohibiting allegedly deceptive airline fare advertisements"). Those laws are routine exercises of Congress' commerce power, which includes the power to preempt state law through the Supremacy Clause.

Thus, while it is easy to take a few sentences from *New York* and *Printz* out of context and begin to imagine commandeering problems lurking throughout the U.S. Code, the anti-commandeering principle is actually quite narrow—and necessarily so: Congress may altogether prohibit states from engaging in conduct or enacting laws contrary to federal policy (as in *Gade* and *Morales*), and it may prohibit states from engaging in certain activity unless they comply with federal policy (as in *Baker* and *Condon*), but what Congress may not do is require states to enact federally-specified laws or to enforce federal laws—*i.e.*, deprive states of the option of doing nothing at all. Unless the commandeering doctrine is to swallow preemption whole, it cannot be understood to invalidate laws that neither "require [states] to enact any laws or regulations" nor "require state officials to assist in the enforcement of federal statutes." *Condon*, 528 U.S. at 150-51.

Petitioners downplay this critical distinction between permissible prohibitions on state activity and impermissible commands to act, but *Printz* itself went to great pains to draw the same distinction to distinguish the unprecedented and improper commandeering it confronted from the sea of laws that uncontroversially limit state action through the ordinary operation of the Supremacy Clause, *i.e.*, the "duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid." 521 U.S. at 913. Preemption is a necessary, appropriate, and unremarkable consequence of the Supremacy Clause, and the commandeering cases themselves make perfectly clear that Congress does not commandeer the states when it precludes them from engaging in conduct or from authorizing others to engage in conduct that conflicts with federal policy.

Petitioners contend that the distinction between prohibitions and commands is "irreconcilable with this Court's cases." NJ.Br.32. But all they succeed in showing is that the anti-commandeering principle is even *narrower* and more specific than the prohibition/command dichotomy suggests. Instead of identifying a case in which this Court found impermissible commandeering in the absence of an affirmative command (there is none), petitioners demonstrate only the converse (and, for them, unhelpful) proposition: "*Reno v. Condon* involved a federal 'prohibition' that required 'affirmative action' on the part of the State in order to comply, but the

Court nevertheless rejected South Carolina's commandeering argument." NJ.Br.32. *Condon* thus illustrates only that the mere fact that a federal law may force the state to take certain action does not, in and of itself, prove impermissible commandeering.[4]

In short, petitioners' sweeping conception of the commandeering doctrine ignores just how unusual the laws at issue in *New York* and *Printz* really were. There is a fundamental difference between federal legislation that compels states to enact or implement federal policy and federal legislation that requires states to refrain from engaging in or authorizing conduct that is contrary to federal policy. Maintaining that distinction is essential to ensuring that *New York* and *Printz* remain important exceptions to an equally important and well-established rule. The only way to keep a clear line between uncontroversial, commonplace preemption and impermissible, aberrant commandeering is to limit the latter to laws that command states to enact or implement federal policy.

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[4] The only other case petitioners cite, *Coyle v. Smith*, 221 U.S. 559 (1911), concerns the equal footing doctrine, not the anti-commandeering doctrine. *Coyle* rejected a federal law that prohibited Oklahoma from moving its state capital—not because laws that impose prohibitions on states raise Tenth Amendment concerns, but because, by prohibiting Oklahoma alone from choosing the location of its capital, the law placed Oklahoma "upon a plane of inequality with its sister states in the Union." *Id.* at 565.

B. PASPA Does Not Compel States to Enact or Administer Federal Policy.

PASPA lacks the irreducible minimum of any successful commandeering claim: It does not compel states or state officials to do anything. States are not required to enact laws, to take title to something, to conduct background checks, to consider federal standards, to expend funds, or to enforce federal law. Proving the point, New Jersey fully complied with PASPA for two decades without doing *anything*. That is because PASPA only *prohibits* states from sponsoring, operating, advertising, or promoting sports-gambling schemes, and *prohibits* states from licensing or authorizing third parties to engage in that conduct. PASPA does not force states to take any affirmative action to comply with those prohibitions.

Thus, while petitioners portray PASPA as an anomalous effort to enlist states to do the federal government's bidding, the reality is that PASPA is an unremarkable effort to preclude states from engaging in certain conduct and to preempt state laws that license or authorize others to do the same. To be sure, states enjoy less power to run sports lotteries or license sports books in casinos post-PASPA than they had pre-PASPA. But countless federal statutes restrict state legislative options through the ordinary operation of the Supremacy Clause. Simply put, PASPA raises none of the distinct concerns that animate and necessitate the commandeering doctrine.

1. It is important to recognize at the outset that PASPA is not a general anti-sports-gambling statute, designed to ensure that individuals never place a wager on a sporting event. Indeed, PASPA does not

address the placing of sports wagers by individuals at all. Instead, Congress enacted PASPA for a more limited purpose: to prohibit states from operating (or promoting or advertising) a "lottery, sweepstakes, or other betting, gambling, or wagering scheme based on" professional or amateur sports or from authorizing third parties to do the same. 28 U.S.C. §3702. In other words, PASPA is focused on preventing states from entering, or authorizing others to enter into, the market for *providing* sports gambling, whether in the form of lotteries, sports books, or some other gambling "scheme."

That limited focus makes sense, as PASPA was the product of concerns that states were beginning to turn to state-sponsored sports-themed lotteries and other state-authorized sports gambling as a source of revenue. While Congress was not indifferent to private parties *engaging* in sports gambling, it was content to leave that issue primarily to the states and to the many federal criminal laws that provide a backdrop to state enforcement efforts. The specific concern that animated PASPA was the nascent trend toward states actually *operating* sports-gambling schemes, or authorizing others to do so in their stead, in an effort to raise revenue. For example, members of Congress expressed particular concern with a proposed Oregon state lottery that would have been based on the results of sporting events, and with the very real possibility that other states would follow Oregon's lead.[5]

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[5] Congress' limited focus on state-operated and state-authorized sports-gambling schemes is reinforced by the grandfathering exceptions, which grandfather sports-gambling

Given the national scope of professional and amateur sports, the undeniably commercial aspects of lotteries and sports gambling, and the scope of modern Commerce Clause jurisprudence, there can be no serious dispute that Congress could have passed a law simply prohibiting sports gambling nationwide (perhaps with a grandfather clause for certain pre-existing lawful enterprises with distinct reliance concerns). But that kind of nationwide prohibition would have been overkill, both because almost all states already prohibited sports gambling and because federal law already included substantial prohibitions on illegal sports gambling. What Congress wanted to do, and all it needed to do, was to stop states from operating sports lotteries or sports books or authorizing third parties to do so.

2. There is no question that Congress can do the former—*i.e.*, Congress can prohibit states from entering the sports-gambling market themselves. Indeed, this Court has long held that Congress is free to prevent states from raising revenue through activities that contravene federal policy. *See, e.g.*, *Condon*, 528 U.S. at 151. And that is the very first thing PASPA does, making it unlawful for states themselves to "sponsor, operate, advertise, [or] promote" a sports lottery or other sports-gambling scheme. 28 U.S.C. §3702(1). Thus, any effort by a state to operate a sports-gambling scheme itself plainly would be preempted by PASPA—regardless of

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schemes operated by states, 28 U.S.C. §3704(a)(1), and authorized by states, *id.* §3704(a)(2), but make no reference to the extent of other pre-PASPA sports gambling, such as whether pre-PASPA state law prohibited small sports wagers among friends.

whether that effort came in the form of a state law expressly authorizing state-operated sports gambling or a state law purporting to partially "repeal" existing broad prohibitions on sports gambling only when it comes to state-operated sports-gambling schemes.

That does not mean that PASPA "commandeers" states into maintaining their existing laws on sports gambling. If, for example, a state had an existing felony prohibition on all lotteries, it could maintain the law, it could repeal the law, it could downgrade the crime to a misdemeanor or increase the penalty, and it could amend the law to permit the state to run a lottery that did not involve sports. PASPA permits all those options. But if the state modified its law, whether through a new authorization or through an amendment partially repealing the existing prohibition, to authorize the state to conduct a sports lottery, that modified law would be preempted by PASPA—and that result would raise no commandeering concern.

There is likewise no question that Congress can prohibit private parties from entering the sports-gambling market. And PASPA does that too, making it unlawful for any person to "sponsor, operate, advertise, or promote" a sports-gambling scheme pursuant to state law or compact. *Id.* §3702(2). Again, that does not mean that states are "commandeered" into maintaining prohibitions on sports-gambling schemes operated by third parties. Section 3702(2) is a belt-and-suspenders provision that makes clear that even if a state purports to authorize a sports-gambling scheme notwithstanding §3702(1), private parties are still prohibited from undertaking conduct pursuant to

state law that is contrary to federal policy. That regulation of private conduct poses no federalism difficulty.

3. According to petitioners, Congress somehow crossed the constitutional line by making explicit in §3702(1) what is already implicit in §3702(2)—namely, that state laws "authorizing" a third party to provide a sports-gambling scheme are preempted by federal law. But petitioners do not and cannot explain why including that prohibition makes any constitutional difference. Just like PASPA's prohibitions making it unlawful for states to offer sports-gambling schemes themselves, and its prohibitions making it unlawful for third parties to offer sports-gambling schemes pursuant to state law, PASPA's prohibition making it unlawful for states to authorize third parties to offer sports-gambling schemes does not require states to enact, maintain, consider, enforce, or *do* anything. Instead, it just renders inoperable any state law that "authorize[s] by law or compact" a sports-gambling scheme. 28 U.S.C. §3702(1). That does not cross a constitutional line. A "wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).

This all is remarkably straightforward when it comes to lotteries, a market in which states have traditionally been directly involved. PASPA plainly prevents a state from sponsoring or operating its own sports lottery. PASPA just as plainly prohibits the state from authorizing or licensing a third party to run

a sports lottery. And whether a sports lottery is conducted by the state or by a third party, neither the state nor a third party can advertise or promote it. If existing state law already prohibits all of that, then the state obviously is not in violation of PASPA, but it is not required to maintain those state-law prohibitions to stay compliant. The state could repeal the entirety of its laws prohibiting or authorizing lotteries without running afoul of federal law. But if the state changes its laws to authorize, either explicitly or implicitly, the state or a specified third party to sponsor, operate, advertise, or promote a sports lottery, the law would be preempted by PASPA, without any commandeering problem.

The result is no different when it comes to sports books, even though, unlike with sports lotteries, the lone state that permitted sports books pre-PASPA did not conduct the sports gambling itself. In that context as well, PASPA still operates by preventing the state from providing its own sports book, preventing the state from licensing or authorizing a third party to provide a sports book, and preventing either the state or a third party from promoting or advertising a sports book. If existing state law already prohibited sports books, then that state law does not conflict with PASPA, but the state will remain in compliance with PASPA even if it modifies or repeals the existing law—as long as it does not either run a sports book or authorize a third party to do so. Once again, there is no commandeering problem.

Nor does PASPA force states to bear the brunt of policing third party efforts to operate sports-gambling schemes in violation of PASPA. To the contrary,

PASPA explicitly contemplates that states are *not* responsible for enforcing its prohibitions, as the statute gives the Attorney General and sports organizations, not the states, the power to bring actions seeking to enjoin violations of PASPA, whether by the state itself (in violation of §3702(1)) or by a third party (in violation of §3702(2)). *See* 28 U.S.C. §3703. PASPA thus neither requires states to enact or maintain any laws, nor requires states to do anything to enforce the federal-law prohibitions it creates. Instead, PASPA just prohibits states from entering or authorizing third parties to enter into the market for providing sports-gambling schemes, and then leaves it to the federal government and sports organizations to enforce those prohibitions.

4. As all of that illustrates, there is nothing unusual, let alone constitutionally suspect, about the fact that PASPA prohibits states from authorizing third parties to offer sports-gambling schemes to the public. Countless federal statutes and regulations prohibit states from enacting, maintaining, or enforcing laws that regulate third parties in ways that conflict with federal policy. *See, e.g.*, 15 U.S.C. §1121(b) ("No State ... may require alteration of a registered mark.").[6] That does not mean that all of

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[6] *See also, e.g.*, 7 U.S.C. §136v(b) (a "State shall not impose or continue in effect any requirements for labeling or packaging [pesticides] in addition to or different from those required under this subchapter"); 21 U.S.C. §360k(a) ("no State ... may establish or continue in effect with respect to a device intended for human use any requirement" that conflicts with federal requirements); 21 U.S.C. §678 (identifying requirements relating to food or drug inspection that "may not be imposed by any State"); 46 U.S.C. §4306 ("a State ... may not establish, continue in effect, or enforce

those laws impermissibly "regulate state governments' regulation of interstate commerce," NJ.Br.22, or somehow compel states to enact laws embracing whatever federal policy underlies those prohibitions. It just means that, to the extent a state adopts a law that regulates third parties in a way that conflicts with federal policy, the Supremacy Clause renders that law inoperable.[7]

The same is true of laws that, like PASPA, prohibit states from "licensing" or "authorizing" certain third-party conduct. For example, FDA regulations preempt any state law authorizing generic drug manufacturers to modify their labels. *See PLIVA Inc. v. Mensing*, 546 U.S. 604 (2011). The Federal Aviation Administration Authorization Act preempts any state law authorizing a state port authority to impose "placard and parking requirements" on interstate trucking companies. *Am. Trucking Ass'ns*

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a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment"); 49 U.S.C. §11501(b) ("a State ... may not" impose certain taxes on rail transportation property); *id.* §31111(b) ("a State may not prescribe or enforce a regulation of commerce" that imposes length requirements on certain vehicles); *id.* §40116(b) ("a State ... may not levy or collect a tax, fee, head charge, or other charge on" air commerce or transportation).

[7] PASPA is a bit unusual in terming "unlawful" state laws that conflict with the federal policy reflected in PASPA. But that is just an accurate, if unvarnished, description of the operation of the Supremacy Clause. Moreover, that choice of phraseology simply reflects that, unlike most statutes with preemptive force, Congress expressly provided an enforcement mechanism to redress state laws that are "unlawful" under PASPA. *See* 28 U.S.C. §3703.

v. City of Los Angeles, 133 S. Ct. 2096 (2013). In exactly the same way, PASPA preempts state laws authorizing third parties to offer sports-gambling schemes. The difference between the statutes in *New York* and *Printz* on the one hand, and all of these mine-run preemption statutes on the other, is that the former *compelled* states to enact or implement federal laws, while the latter *preclude* state laws that violate federal policy. PASPA falls squarely in the latter camp.

C. PASPA Does Not Require States to Maintain Sports-Gambling Prohibitions.

Implicitly accepting the reality that commandeering concerns arise only when a federal law compels states to enact or enforce federal policy, petitioners attempt to recast PASPA as a law that does just that. According to petitioners, PASPA does not confine itself to preempting state actions and laws that conflict with federal policy, but also compels states to maintain and enforce laws prohibiting sports gambling. NJ.Br.22-23. Petitioners essentially contend that any retreat from any pre-existing state-law prohibitions on sports gambling would be treated as a forbidden *de facto* authorization of a sports-gambling scheme, and thus that states must maintain their existing prohibitions to comply with PASPA.

The problem with that argument is that PASPA contains no such command. As its plain text makes clear, PASPA does not require states to maintain or enforce anything. It just renders unlawful state efforts to "sponsor, operate, advertise, promote, license, or authorize by law or compact" sports-gambling schemes. 28 U.S.C. §3702(1). If the state

passes a law that does any of those things, that law will be preempted. But as respondents have conceded time and again, and the Third Circuit concluded as well, if New Jersey wants to fully repeal its prohibitions on sports gambling, it can do so without running afoul of PASPA's prohibition on "authorizing" sports-gambling schemes. New Jersey is also free to alter its prohibitions in ways that do not amount to an authorization of sports-gambling schemes, such as by altering the penalties, or creating exceptions for *de minimis* friendly wagers that do not create an authorized sports-gambling "scheme." *See* Pet.App.24. And, of course, New Jersey controls the extent to which it enforces sports-gambling prohibitions that remain on its books. *See* Pet.App.25.

Petitioners resist this straightforward reading of PASPA, insisting that PASPA's prohibition on authorization of sports-gambling schemes amounts to "a direct command to States to maintain their state-law prohibitions." NJ.Br.40. Betraying the weakness of that claim, New Jersey's lead "statutory" argument is not about the statutory text at all, but rather is an accusation that respondents' and the Third Circuit's positions on the interpretation of PASPA have "continually morphed." NJ.Br.40-41. But, in reality, not a single one of the interpretations petitioners recount suggests that PASPA prevents New Jersey from fully repealing its sports-gambling prohibitions. Since day one of this litigation, respondents have not argued, and no court has held, that PASPA requires

states "to affirmatively keep a prohibition against sports wagering on their books." Pet.App.22.[8]

When petitioners finally turn to the text of the statute, they engage in a strange sort of reverse-constitutional-avoidance, contending that this Court should construe the word "authorize" as expansively as possible so that every repeal of a sports-gambling prohibition would amount to an "authoriz[ation]" of a sports-gambling scheme. NJ.Br.42-45; NJTHA.Br.31-32. Setting aside the fact that petitioners made the *opposite* argument below, *see* Brief For Appellants Christopher J. Christie, *et al.*, at 34 ("When a prohibition is withdrawn ... it does not reflect authorization."), their current contention gets matters backwards. Courts are supposed to read statutes to avoid constitutional difficulties, not to create them. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

Ignoring that canonical rule, New Jersey digs deep into Black's Law Dictionary, skipping over the first, second, and third definitions of "authorize" and disclosing only the fourth. NJ.Br.42. The first three

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[8] The procedural history of this case actually undermines petitioners' claim that a full repeal would constitute an "authoriz[ation]" under PASPA. Before enacting the 2012 Law, New Jersey amended its state constitution to remove its existing prohibition against state laws authorizing wagering "on the results of any professional, college, or amateur sport or athletic event." N.J. Const. art. IV, §VII, ¶2D. That repeal of a constitutional prohibition was not enough, standing alone, to "authorize" such gambling—as evidenced by New Jersey's subsequent enactment of the 2012 Law and 2014 Law, and as evidenced by the fact that respondents have never sought to compel New Jersey to reinstate its constitutional prohibition.

omitted definitions of "authorize" plainly would not encompass all repeals: "To empower; to give a right or authority to act; to endow with authority or effective legal power, warrant, or right." Black's Law Dictionary 133 (6th ed. 1990). New Jersey repeats the tactic with Webster's Third, skipping over "to endorse" and "[to] empower" before arriving at its preferred "[to] permit by or as if by some recognized or proper power." Webster's Third New Int'l Dictionary 146 (1992). There is no reason to resort to tertiary and quaternary definitions to create a constitutional question that otherwise would not exist.

Nor would the broad reading of "authorize" that petitioners have suggested be consistent with Congress' goals in enacting PASPA. As New Jersey's own citations indicate, Congress was specifically concerned that allowing states to put their imprimatur on sports-gambling schemes—whether by running them themselves or by authorizing others to do so—would impart a "moral status" that could "draw new recruits." NJ.Br.43. Given that specific concern with states' affirmative provision of and encouragement of sports-gambling schemes, there is no reason to believe that Congress used the word "authorize" to prohibit states from staying on the sidelines. Thus, as the Third Circuit has now correctly recognized on three separate occasions, PASPA does not prevent states from repealing their sports-gambling prohibitions.

To be sure, Congress may well have assumed that if it enacted a federal policy that prevented states from providing or authorizing the provision of sports-gambling schemes, states would respond by

maintaining their existing prohibitions. But that is because PASPA was animated by Congress' concern that, despite policy concerns with sports gambling, states would nonetheless authorize sports lotteries and casino-style sports gambling to raise revenue, especially if other states were doing likewise. *See supra* pp.6-7. Thus, Congress may have assumed that if PASPA disabled states from *profiting* off of sports gambling (either by running it themselves or by authorizing or licensing third parties to do so), then states would be inclined to maintain the status quo.

If that was indeed Congress' assumption, it proved to be a sound one, as states responded to PASPA with nearly decades of relative inactivity (hardly a promising basis for a commandeering claim). But that certainly does not establish that PASPA freezes in place all state sports-gambling laws. To the contrary, PASPA plainly allows states to change their laws. As noted, PASPA addresses the extent to which states and their authorized agents conduct sports-gambling schemes, but it does not directly address sports gambling by individuals. Thus, states can alter laws addressing such conduct, such as by decriminalizing sports wagers between social acquaintances, without implicating PASPA. Moreover, nothing in PASPA prevents the four states that had sports gambling in place when it was enacted from changing their laws to curtail their sports-gambling schemes. Likewise, had New Jersey availed itself of its one-year window to authorize sports gambling in its casinos, nothing in PASPA would have prevented New Jersey from reversing course in whole or in part. To be sure, if a state that may operate a *limited* sports-gambling scheme under PASPA were to

expand sports gambling beyond what PASPA permits, that expansion would be preempted. *See, e.g.*, *Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009), *cert. denied*, 559 U.S. 1106 (2010). But that is just the ordinary operation of the Supremacy Clause, not an impermissible effort to force states to maintain their pre-PASPA laws on the books.

As all of that illustrates, while Congress may have assumed states would maintain the status quo if they could not profit off of sports gambling, that does not mean that Congress compelled them to do so. And, at bottom, neither the fact that Congress assumed states would maintain existing prohibitions, nor the fact that states did just that—nor even the fact that if multiple states repealed their laws Congress might need to enhance existing federal statutes that pre-supposed the existence of state-law prohibitions—changes two basic realities: PASPA does not prohibit a state from repealing its sports-gambling prohibitions entirely, and PASPA does not commandeer states.[9]

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[9] It is not uncommon in our federal system for Congress to enact a law that pre-supposes certain state-law prohibitions. For example, the Assimilated Crimes Act, 18 U.S.C. §13, makes it a federal crime to violate the state criminal laws of adjacent jurisdictions on a federal enclave. That law pre-supposes that states prohibit certain conduct, and if a state repealed certain prohibitions, Congress might need to amend federal law in response. But none of that means states cannot repeal their laws or otherwise creates a constitutional problem. More typically, federal criminal laws, like the prohibition on gambling businesses, discussed *supra* p.5, pre-suppose a certain degree of state prohibitions. If multiple states decided to decriminalize gambling, Congress might have to adjust those laws accordingly, but none of that prevents states from repealing their laws or creates a looming commandeering problem.

D. PASPA Constitutionally Preempts the 2014 Law.

Petitioners try to avoid that conclusion by insisting that, because PASPA preempts New Jersey's self-styled "partial repeal," it must prohibit *all* repeals of sports-gambling prohibitions, and thus commandeers the states. Again, petitioners are mistaken. While *some* repeals of sports-gambling prohibitions are certainly consistent with PASPA, that does not mean that everything labeled a "repeal" necessarily passes muster. Nor does it mean that states may circumvent PASPA's prohibition on affirmatively authorizing sports-gambling schemes by styling as a "partial repeal" a law that channels sports gambling to state-selected (and state-licensed) gambling venues on state-selected terms.

And that, as the *en banc* court correctly held, is precisely what the 2014 Law did. Pet.App.12-16. Although petitioners' briefs proceed as if the 2014 Law actually repealed existing prohibitions on sports gambling, that demonstrably false premise was expressly rejected below (in a holding that petitioners do not challenge). The 2014 Law does not repeal *any* of New Jersey's myriad prohibitions on sports gambling; indeed, it did not eliminate a single word from those laws. Instead, it just declared those prohibitions inapplicable to sports-gambling schemes "to the extent" they are provided by venues of the state's choosing (state-licensed casinos or racetracks), available only to persons of the state's choosing (patrons who are 21 or older), and restricted to sporting events of the state's choosing (those that do not involve college sports contests taking place in New

Jersey or in which a New Jersey college team is participating). In other words, the 2014 Law affirmatively grants casinos and racetracks a legal "right" to offer sports-gambling schemes that New Jersey has denied everyone else in the state. That is plainly an authorization, as the Third Circuit held.[10]

That the state achieved this end by purporting to "partially repeal" its sports-gambling prohibitions "to the extent" its chosen conditions are satisfied, rather than declaring that sports-gambling schemes "are hereby authorized" to the same extent, does not change the bottom line. *See Haywood v. Drown*, 556 U.S. 729, 742 (2009) ("[T]he Supremacy Clause cannot be evaded by formalism."). A state law that "repealed" existing blanket prohibitions on sports lotteries, but only to the extent conducted by the state (or its hand-picked third party), and only if the operator omitted in-state college games, would equally constitute an authorization of a sports lottery and would equally be preempted by PASPA.

Petitioners fare no better with their contention that the district court's injunction somehow compels New Jersey to maintain its sports-gambling prohibitions. NJ.Br.36-37; NJTHA.Br.35-38. The injunction, like PASPA itself, does not require New Jersey to maintain or enforce any laws; it simply forbids New Jersey from "giving operation or effect" to the 2014 Law, which was found preempted. Pet.App.113. To be sure, as a practical matter, that

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[10] The 2014 Law also violates PASPA because it "license[s]" sports-gambling schemes, as it makes them legal only if they are offered by a venue that already has a state license to provide gambling.

invalidation of a supposed partial repealer means New Jersey's sports-gambling prohibitions now remain in force at casinos and racetracks as well as everywhere else. But that is not because the injunction prohibits New Jersey from repealing the state-wide prohibitions; it is simply because the injunction invalidates the state law that purported to repeal the laws only at the state's favored venues.

That relief is no different from the relief whenever a state enacts an invalid "partial repealer." Judicial invalidation of the flawed repealer necessarily returns the law to the status quo—which here, after two failed efforts to introduce state-authorized sports gambling, is the pre-existing prohibitions. For example, if a state were to "partially repeal" its workplace anti-discrimination laws by declaring them inapplicable to African-Americans, the inevitable federal injunction of that invalid "partial repeal" would restore the pre-existing general prohibition on workplace discrimination. But that would hardly mean that the injunction impermissibly "operates as a direct command to the State's Executive to re-impose the stricken prohibitions." NJ.Br.36-37.[11]

Moreover, it is simply untrue that "from the moment the 2014 Repeal was enacted, ... those state-law prohibitions were considered as if they never existed." NJ.Br.36 (alterations omitted). Again, the 2014 Law did not remove New Jersey's pre-existing

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[11] The fact that the injunction does not require New Jersey to *enforce* its state-law prohibitions answers NJTHA's alarmist rhetoric about "state officials ... being hauled into federal court ... for their failure to ... bring [a] state law prosecution." NJTHA.Br.37 & n.17.

sports-gambling prohibitions from the statute books; all it did was declare those still-extant prohibitions inapplicable to certain sports-gambling schemes. The district court's injunction thus did not "command ... the State's Executive to re-impose ... stricken prohibitions," NJ.Br.36-37, but rather just removed an invalid exception to those still-and-always extant prohibitions. Indeed, NJTHA concedes as much, acknowledging that even though the injunction is not directed to NJTHA, any of its employees who accept sports wagers "would be in violation of every state criminal and civil law prohibiting sports gambling." NJTHA.Br.36. As that concession underscores, NJHTA cannot provide sports gambling today not because of the injunction but because New Jersey's sports-gambling prohibitions *are still on the books*, and the exemption/authorization the state tried to create through the 2014 Law has been found preempted.

In sum, petitioners' core argument—that a "federal prohibition against States' repeals of their own laws violates the anti-commandeering principle," NJ.Br.31—is simply not implicated by PASPA. PASPA does not prohibit states from repealing their sports-gambling prohibitions. That is the most natural reading of PASPA, and it is certainly a permissible construction under the well-established canon instructing courts to avoid, rather than engender, constitutional doubts. New Jersey's sports-gambling prohibitions remain on the books only because New Jersey has (so far) chosen not to repeal them.

E. The Commandeering Doctrine Does Not Entitle New Jersey To Achieve Policy Objectives that Are Inconsistent with Federal Law.

Petitioners are thus reduced to arguing that PASPA runs afoul of the commandeering doctrine not because it compels states to enact or enforce federal policies, but because it prevents New Jersey from effectuating the *specific policy* it prefers. As New Jersey puts it, PASPA is unconstitutional because it "leaves New Jersey no real option to lift its prohibition on sports wagering *at casinos and racetracks*." NJ.Br.46.

While it is true that PASPA prevents New Jersey from enacting a targeted decriminalization for casinos and racetracks, so that sports-gambling schemes are prohibited unless they are provided by the state's favored venues specifically designed for state-sponsored and state-licensed gambling, that has more to do with the nature of casinos and racetracks than with any constitutional issue. Under PASPA, there is no way for a state to steer lawful sports-gambling schemes to the state's hand-picked venues for state-authorized gambling, just as there is no way for a state to steer a sports lottery to its handpicked third-party lottery operator. That is because the whole point of PASPA is to prohibit states from operating sports-gambling schemes or authorizing third parties to do the same.[12] But a federal law does not commandeer

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[12] Thus, while New Jersey is free to repeal its prohibitions on sports gambling, and is free to license casinos as venues for state-authorized gambling, it may not be free to do both under PASPA without specifying that casinos may not offer sports-gambling

the states just because it limits their policy options; nor does the Constitution require Congress to let states override its policy preferences in areas that fall within its enumerated powers. States are not free to have a little bit of airline rate regulation, a little bit of generic drug labeling regulation, or a little bit of state-sponsored sports-gambling schemes.

None of that creates a commandeering problem, as this Court's cases make abundantly clear. In *Hodel*, for example, this Court addressed the Surface Mining Control and Reclamation Act, which, among other things, prescribed federal performance standards for surface coal mining on "steep slopes." 452 U.S. at 283-84. The district court invalidated the act on the ground that it interfered with states' ability to make "essential decisions" about land use, *id.* at 284-85, but this Court reversed, rejecting the notion that there is something wrong with a federal law that limits "the States' freedom to make decisions." *Id.* at 289. To the contrary, the whole point of the Supremacy Clause is to ensure that Congress can "displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law." *Id.* at 290. Even though "such congressional enactments obviously curtail or prohibit

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schemes. But that is because PASPA limits a state's ability to authorize sports-gambling schemes at state-licensed casinos, not because PASPA prevents a state from repealing its sports-gambling prohibitions. That result is no different from the dynamic produced in *Baker* and *Condon*. Under the federal statutes at issue there, states could not issue bonds or sell drivers' license information without complying with federal law. Under PASPA, states are not free to authorize gambling schemes at state-licensed casinos without complying with PASPA.

the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Id.*

So too here. There is no dispute that Congress may exercise its commerce power to regulate gambling on a nationwide basis. *See Champion*, 188 U.S. at 352. And although Congress has accommodated New Jersey's interest in legalizing and collecting revenues from games of chance, it has also decided that state-sponsored sports gambling raises distinct issues and is contrary to federal interests, and therefore has taken that option off the table. Just as the SMCRA would preempt any state law authorizing steep-slope mine operators to violate federal performance standards, PASPA preempts state laws authorizing casinos and racetracks to violate the federal policy against offering sports-gambling schemes. It would be "a radical departure from long-established precedent ... to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity." *Hodel*, 452 U.S. at 292.

Petitioners make the strained argument that *Hodel* has no bearing here, contending that PASPA, unlike the SMCRA, "provides no option of yielding the field to federal regulation of sports wagering; no federal regulatory scheme exists." NJ.Br.50. The first part of that contention is plainly untrue; the second is both irrelevant and untrue. With respect to the first part, as already discussed, nothing in PASPA requires states to regulate or prohibit sports gambling. States remain free to repeal their prohibitions on sports

gambling and yield the field to the federal government.

As for New Jersey's contention that "no federal regulatory scheme exists," that ignores both PASPA and the complementary provisions of the Code directed at sports gambling. First, PASPA does impose a "regulatory scheme" in the narrow field in which operates. PASPA is not designed to prohibit any and all sports gambling and does not directly address sports wagering by individuals. It is instead concerned with the specific problem of states operating or authorizing sports-gambling schemes. And in that field, PASPA regulates comprehensively, forbidding states from operating such schemes or authorizing third parties to do so, 28 U.S.C. §3702(1), and prohibiting private parties from conducting such schemes pursuant to state law, *id.* §3702(2). PASPA then provides a specific federal remedy to enforce those prohibitions. *Id.* §3703. That is hardly the absence of a federal regulatory regime.

And PASPA does not stand alone. Federal laws also prohibit interstate transmission of wagers on sporting events, 18 U.S.C. §1084(a), any attempts to influence the outcome of a sporting contest through bribery, *id.* §224, operation of an illegal gambling business, *id.* §1955(a), the interstate transmission of sports lottery tickets, *id.* §1301, and certain forms of internet sports gambling, 31 U.S.C. §5362(10).[13] All of

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[13] New Jersey is incorrect in asserting that 18 U.S.C. §1084's prohibition on interstate transmission of wagers "does not apply where a State has legalized the activity." NJ.Br.52. In fact, §1084(b) allows the transmission only of "information" about sporting events between two states that allow sports gambling;

those prohibitions, moreover, are backed up by the Racketeer Influenced and Corrupt Organizations Act (RICO), which authorizes criminal penalties and civil liability for illegal gambling conducted by criminal organizations. *Id.* §§1961-68. And, of course, if New Jersey or any other state fully repeals its sports-gambling prohibitions, Congress can certainly impose additional or enhanced federal restrictions as it sees fit.

In all events, even if Congress had not enacted any of those laws, the resulting regulatory vacuum would not create a commandeering problem. This Court has already rejected the argument that the absence of a federal backstop causes a commandeering problem. In *FERC v. Mississippi*, 456 U.S. 742 (1982), this Court addressed a law that gave states a choice between considering federal ratemaking standards or abandoning the field of public utility regulation to the federal government. *Id.* at 764-65. Congress, however, did not "provide an alternative regulatory mechanism to police the area in the event of state default," which made "the choice ... a difficult one" for the states. *Id.* at 766. This Court nonetheless upheld the statute against Tenth Amendment attack, explaining that even though the absence of a federal backstop was "likely to move the States to act in a given way," that absence "cannot be constitutionally determinative." *Id.*

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the interstate transmission of "bets or wagers" remains prohibited under §1084(b), regardless of whether sports gambling is permissible in the sending and receiving states. *See McDonough*, 835 F.2d at 1105.

Moreover, when Congress acts with a deregulatory purpose, as in the ADA and FAAAA, a state has no choice but to abandon the field. No matter how much a state abhors a regulatory vacuum for certain airline or trucking rates and services, the state must abandon the field—and there is no constitutional problem. That is because there is simply "no doctrinal authority requiring the creation of a federal regulatory scheme in order for the national government to divest the states of power in an arena." Ryan Baasch & Saikrishna Prakash, *Congress and the Reconstruction of Foreign Affairs Federalism*, 115 Mich. L. Rev. 47, 90 (2016).

More fundamentally, the question under the anti-commandeering doctrine cannot possibly turn on what the federal government would do if the state abandons the field, because the very fact that the state *could* abandon the field is sufficient to eliminate a commandeering problem. The relevant question in a commandeering challenge is not whether the state will like what the federal government does if the latter takes control, but whether the state has the option to cede control in the first place. If the answer is yes, then there is no commandeering. The answer under PASPA is plainly yes.

Moreover, contrary to petitioners' insistence that "PASPA does not enact a cooperative federalism regime" in the same manner as *FERC* or *Hodel*, NJ.Br.51, PASPA provides New Jersey with far more flexibility than it would have if Congress banned sports gambling outright—which everyone agrees Congress could do. Under PASPA, states can determine the nature and extent of the penalties for

engaging in various forms of sports gambling (as New Jersey has done, *e.g.*, N.J. Stat. Ann. §2c:37-2); and they can implement any other policy that does not conflict with the federal policy against state-sponsored sports-gambling schemes. It would be "a curious type of federalism" that required Congress to take away those options and instead federalize every sports-gambling prosecution, even though "its preference is to let the States retain the primary regulatory role." *FERC*, 456 U.S. at 766 n.29. New Jersey essentially asks this Court to punish Congress for acting in a manner more, not less, solicitous of state sovereignty.

New Jersey hints at an argument that the choice between maintaining its sports-gambling prohibitions and repealing them in full is overly "coercive" because "no responsible government" would choose the latter option. NJ.Br.46-47. But even if PASPA left only those two options—and the *en banc* court held to the contrary, Pet.App.23—New Jersey is hardly well positioned to press a "coercion" argument when, mere months after the *en banc* court's decision (indeed, the day before this Court granted *certiorari*), legislators in New Jersey introduced a bill that "would totally remove and repeal the State's prohibitions" on sports gambling. G.A. S3375, 217th Leg. (2017). New Jersey thus cannot credibly argue that the prospect of full repeal is so implausible as to be equivalent to "a gun to the head." *NFIB v. Sebelius*, 567 U.S. 519, 581 (2012) (opinion of Roberts, C.J.).

Nor can petitioners credibly argue that PASPA raises accountability concerns. The accountability problem with which the commandeering doctrine is concerned arises only "where the Federal Government

compels States to regulate" or to enforce federal law, thereby creating the appearance that state officials are responsible for policies that Congress forced them to enact. *New York*, 505 U.S. at 168. No such problem exists here because PASPA does not require states to enact or enforce anything. Unlike in *Printz*, where a state official was required to enforce a potentially unpopular federal law, or in *New York*, where a state would have to enact federally-prescribed legislation, here there is no state action demanded by federal law. And if a citizen complains to state officials about not doing more about airline rates or about not having a sports book in the local casinos, state officials have an easy answer that promotes accountability: Call your Senator. Indeed, New Jersey has hardly been shy about blaming PASPA for the state's inability to introduce sports gambling into its casinos and racetracks.

II. Even Without The Challenged Authorization Provision, PASPA Would Still Prohibit Casinos And Racetracks From Providing Sports Gambling Pursuant To The 2014 Law.

The conclusion that PASPA does not commandeer the states is reinforced by the reality that casinos and racetracks could not offer sports-gambling schemes pursuant to the 2014 Law even *without* §3702(1)'s prohibition on authorizing sports gambling, which is the only provision petitioners challenge. That is because §3702(2) independently prohibits private parties from operating sports-gambling schemes pursuant to state law, and petitioners neither challenge §3702(2) nor have a theory as to how that restriction on private conduct commandeers the

states. Thus, even if New Jersey were to prevail on its commandeering challenge to §3702(1), the result would have little practical effect, as PASPA would still independently prohibit casinos and racetracks from relying on the 2014 Law to engage in the conduct that federal law forbids. That just underscores that PASPA is nothing like the provisions in *New York* and *Printz* (which were directed exclusively at the states and commandeered them), but rather addresses both states, 28 U.S.C. §3702(1), and private parties, *id.* §3702(2), and precludes both from taking action contrary to federal law.

To try to avoid an empty victory, New Jersey proffers an implausible if-you-give-a-mouse-a-cookie severability argument, contending that if the authorization provision falls, then the licensing provision must fall, and if the licensing provision falls, then the prohibitions on state conduct must fall, and if the prohibitions on state conduct fall, then the prohibitions on private conduct must fall with them. NJ.Br.53-56. That is not how severability analysis works. Instead of searching for an excuse to strike down a statute in its entirety, this Court "tr[ies] to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010).

Indeed, the "normal rule" is "that partial, rather than facial, invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). In applying that "normal rule," this Court gives effect to the valid portion of a statute "so long as it remains fully operative as a law, and so long as it is

not evident from the statutory text and context that Congress would have preferred no statute at all." *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2173 (2014) (citations omitted). Congress applied that rule in *New York*, severing the offending provision of the statute and keeping the rest, 505 U.S. at 186-87, and the Court likewise declined to invalidate anything more than the challenged provision in *Printz*, 521 U.S. at 935.[14]

Here, Congress plainly would have wanted PASPA's unchallenged provisions to remain intact. First, there can be no serious dispute that Congress still would have wanted to prohibit states themselves from "sponsor[ing], operat[ing], advertis[ing], [or] promot[ing]" sports-gambling schemes even it could not also prohibit them from "authorizing" third parties to offer sports-gambling schemes. While New Jersey makes the remarkable claim in a footnote that "[t]here is no evidence that Congress would have singled out State-run" sports-gambling schemes for prohibition,

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[14] New Jersey repeatedly asserts that the standard for severability is whether a statute, absent its unconstitutional provision, can function in "the manner Congress intended." NJ.Br.54, 56. This Court has never applied that standard, which, at least as petitioners seem to understand it, would render all but the most trivial provisions of a statute inoperative. After all, the "manner" Congress intends a statute to operate is the "manner" that includes all of its provisions. The correct standard is not whether the statute will operate in *exactly* the same manner as before, but whether it will "function in a manner consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). As a unanimous Court thus recently reaffirmed, the relevant question is whether Congress would have wanted the remaining provisions to remain in effect, or "would have preferred no statute at all." *Exec. Benefits*, 134 S. Ct. at 2173.

NJ.Br.55 n.3, that is *exactly* what Congress sought to do. *See supra* pp.6-7; S. Rep. 102-248, at 5 ("Governments should not be in the business of encouraging people ... to gamble."). Thus, even if Congress knew that states could still enact laws authorizing third parties to run sports-gambling schemes, there is no reason to think that Congress would have wanted to allow states themselves to sponsor, operate, advertise, or promote such schemes.[15]

Nor is there any reason to think that Congress would have wanted to abandon §3702(2)'s prohibition making it unlawful for third parties to "sponsor, operate, advertise, [or] promote" sports-gambling schemes pursuant to state law if §3702(1)'s prohibition on state authorization of sports-gambling schemes were to fall. To the contrary, §3702(2) would become all the more essential without the authorization provision in §3702(1) because those two provisions work as belt and suspenders. Section 3702(2) ensures that private parties cannot undermine federal policy by operating sports-gambling schemes *even if* the state may enact laws that authorize them to do so.

Indeed, arguably, the authorization prohibition in §3702(1) is not even strictly necessary, as the

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[15] The states' experiences with lotteries are instructive. In 2016 alone, New Jersey spent $286 million operating and advertising its state lottery. *See* Northstar New Jersey, 2016 Annual Corporate Social Responsibility Report 15, http://www.northstarnewjerseylottery.com/images/2016_Annual_Corporate_Social_Responsibility_Report.pdf. Section 3702(1) prevents states from spending taxpayer dollars to encourage conduct that contravenes federal policy.

unchallenged provisions in §3702(1) already prohibit states from directly conducting and promoting sports-gambling schemes, and the unchallenged provisions in §3702(2) already prohibit third parties from accomplishing what is permissibly forbidden to the states. Congress was certainly well within its power to preempt state laws authorizing private conduct contrary to federal policy from both ends of the proverbial stick, by prohibiting laws authorizing third-party conduct and prohibiting third-party conduct pursuant to the authorizations. But even if (contrary to fact) there were some constitutional problem with the former, the latter would still prohibit the private conduct and would still accomplish Congress' objective of prohibiting sports-gambling schemes run pursuant to state law.

New Jersey claims that it would be "nonsensical" for §3702(2)'s prohibitions on private conduct to apply in the absence of a ban on state authorization of sports-gambling schemes. NJ.Br.56. To the contrary, while it may not make much practical sense for a party to challenge §3702(1) without also challenging §3702(2), the continuing validity of the latter prohibitions on private conduct would make perfect sense in a world where Congress is subject to special limits when regulating states, as opposed to private citizens. Moreover, given Congress' decision to enforce PASPA through an injunctive remedy, 28 U.S.C. §3703, it makes sense to direct a prohibition (and potential injunction) at both the state and the private party when the state has authorized or licensed a third party to operate a sports-gambling scheme.

Indeed, if Congress wanted to prohibit private individuals from operating state-authorized sports-gambling schemes, while giving states a primary role in prohibiting such schemes when they were inclined to exercise it, the most logical way to do so would be to prohibit such private conduct only when it is authorized by state law, which is precisely what §3702(2) does. When a state chooses to prohibit sports-gambling schemes, states can retain the primary regulatory role, with longstanding federal prohibitions available to supplement those state laws. But if states want to authorize sports-gambling schemes, federal law can come in and declare that state-authorized sports gambling unlawful and prohibit private actions pursuant to the unlawful state scheme. Many systems of cooperative federalism work in exactly that way, with federal law deferring to state efforts that meet certain criteria, but with federal prohibitions applicable if a state declines to regulate. In actuality, Congress intended to preempt state laws authorizing sports-gambling schemes, but if there is some heretofore undiscovered constitutional problem with that prohibition, then the remaining prohibitions on private conduct would hardly be nonsensical.

Finally, even if PASPA could not constitutionally block New Jersey from authorizing sports-gambling schemes, it is far from evident that Congress would have wanted the state-licensing prohibition to fall. Removing the powerful temptation of lucrative licensing regimes decreases the odds that states on the fence about whether to allow sports-gambling schemes in their borders ultimately will do so. *See, e.g.*, N.J. Const. art. IV, §VII, ¶2 (prohibiting private lotteries,

but allowing state-run lotteries that fund state programs).

New Jersey argues that if states are permitted to authorize sports-gambling schemes but are not permitted to enact lucrative licensing regimes, then PASPA could lead to "*unregulated* sports wagering." NJ.Br.55. But that depends on whether states given a choice between unlicensed sports-gambling schemes and maintaining existing prohibitions will choose the former. As noted, Congress enacted PASPA against an assumption that the desire for revenues, rather than an affirmative preference for sports gambling, was driving the feared spread of sports gambling. If Congress was correct, then the prospect of unregulated sports gambling will not materialize, and Congress' policy interests will be vindicated. And if it turns out that multiple states opt for unregulated sports gambling, Congress may opt for additional federal regulations. But such speculation is not a basis for striking down aspects of a federal statute that have no constitutional flaw.

* * *

In enacting PASPA, Congress sought to prevent the spread of state-sponsored sports gambling. In full compliance with the anti-commandeering doctrine, Congress effectuated its intent without resorting to anything like the affirmative commands that doomed the statutory provisions at issue in *New York* and *Printz*. Instead, PASPA does no more than what its plain text says: It prohibits a wide range of government and private conduct that would facilitate and encourage the spread of state-sponsored sports gambling. Congress' power to regulate gambling on a

nationwide basis is as settled as its power to prohibit states from undertaking or authorizing conduct that conflicts with federal policy, and nothing in petitioners' arguments calls either commonly exercised power into question.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

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GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

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REPLY BRIEF FOR PETITIONERS

The United States twice concedes that PASPA "would violate the Tenth Amendment" if it required New Jersey "to enact or maintain prohibitions on sports gambling." U.S. Br. 8, 19. And the Leagues acknowledge that as a result of the lower courts' injunction, the state-law prohibitions that New Jersey's Legislature has chosen to repeal must "now remain in force." Leagues Br. 44. That should be the end of the case, because the Commerce Clause does not "confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York* v. *United States*, 505 U.S. 144, 162 (1992), *quoted in* U.S. Br. 11. But that is precisely what PASPA does. It dictates the contents of New Jersey's laws by conscripting New Jersey's Executive—as if he were a "puppet[] of a ventriloquist Congress," *Printz* v. *United States*, 521 U.S. 898, 928 (1997) (quotations omitted)—to keep "in force" statutory prohibitions on sports wagering that the State's Legislature has repealed.

The Leagues and the United States admit they are advancing an "unusual" form of preemption, Leagues Br. 35 n.7, "differ[ent] from the typical formulation," U.S. Br. 16 n.4, where Congress can proscribe state lawmaking in an area of commerce and cause state-law enactments to "revert . . . to [their] pre-amendment status," *id.* at 11, all without adopting any federal regulatory scheme that displaces contrary state law. "[U]nusual," indeed. It is, in fact, so "unusual" that when the Leagues first sued New Jersey, the U.S. Attorney declared in court that no one was "arguing the actual [d]octrine of [p]reemption." App. 3a. And although the United States now claims

that federal law "routinely" bars States from repealing their own state-law prohibitions, the *only* federal law that either the Leagues or the United States can identify that has *ever* compelled a State "to 'administer a law it ha[d] repealed'" is Section 5 of the Voting Rights Act. U.S. Br. 25 & n.8 (quoting *Riley* v. *Kennedy*, 553 U.S. 406, 427 (2008)).

That is very revealing because Section 5's preclearance requirement was an "unprecedented" and "drastic departure from basic principles of federalism." *Shelby Cty.* v. *Holder*, 133 S. Ct. 2612, 2618 (2013). Even if the Fourteenth Amendment grants Congress authority to require a State to administer laws that it has repealed, the Commerce Clause most certainly does not. "[E]ven where Congress has the authority under the Constitution to pass laws . . . prohibiting certain acts, it lacks the power directly to compel the States to . . . prohibit those acts." *New York*, 505 U.S. at 166. Congress cannot escape that fundamental, constitutional, and structural limitation on its power by having its defenders label it "preemption." If the federal law commandeers, it cannot preempt because Congress has no power to regulate States *qua* States.

That leaves the Leagues and the United States to argue that PASPA does not require New Jersey to do anything, including maintaining its prohibitions on sports wagering, because it might somehow permit New Jersey to enact an unspecified "variety" of *different* repeals, U.S. Br. 28, or even to "fully repeal" all of its sports wagering prohibitions, Leagues Br. 37. That is an absurd construction of a statute that, even now, the Leagues say prohibits States from "expan[ding]" sports wagering. *Id.* at 41. But the Leagues and the United States nonetheless insist that New Jersey's

only possible options are to leave its prohibitions on sports wagering at casinos and racetracks in place or "fully repeal" them (including, presumably, restrictions on children and gambling in public buildings)—a "choice" that "amounts in reality to coercion." *Petersburg Cellular P'ship* v. *Bd. of Supervisors of Nottoway Cty.*, 205 F.3d 688, 703 (4th Cir. 2000) (citing *New York*, 505 U.S. at 162). And because Congress lacks the power to compel New Jersey either to maintain its prohibitions or to "fully repeal" them, it "lacks the power to offer the States a choice between the two." *New York*, 505 U.S. at 176.

PASPA's prohibition on state "authoriz[ation] by law" impermissibly commandeers state regulatory authority by dictating the content of state law—States may not legalize sports wagering. Because this constraint on state legalization is central to the statutory scheme, the entire statute should fall, because Congress would not have otherwise enacted PASPA. Without this central provision, PASPA would allow States to legalize sports wagering but prohibit them from regulating it, opening the floodgates to a multi-billion dollar expansion of uncontrolled and underground sports wagering. The Congress that enacted PASPA cannot have wanted that irrational result; to the contrary, the text of PASPA's exceptions makes clear that Congress wanted sports wagering, wherever it might be permitted, to be *regulated* by *States*.

I. PASPA's Prohibition Of The 2014 Repeal Violates The Anti-Commandeering Principle.

A. Commandeering Is Not A Permissible Form Of Federal Preemption.

The Leagues argue that the 2014 Repeal is preempted under a "straightforward application of the Supremacy Clause." Leagues Br. 1. Yet the Supremacy Clause upholds only those laws "made in Pursuance" of the Constitution. Art. VI, cl. 2. However broad congressional power may be under the Commerce Clause, it is subject to the Tenth Amendment, which establishes that federal laws that commandeer state regulatory authority are not valid exercises of that power. The Leagues' categorical argument that federal laws phrased as Commerce Clause prohibitions never commandeer is refuted by this Court's anti-commandeering cases and the rationales underlying them. Indeed, PASPA's prohibition on State regulatory activity—licensing and authorization by law—cannot preempt because no comprehensive federal regulatory scheme governs sports wagering. PASPA simply directs States to exercise their police power to enact, maintain, and enforce federal prohibitions on private activity. Congress is not allowed to do that.

1. Commandeering state governmental machinery is not a valid means of preemption because "the Constitution simply does not give Congress the authority to require the States to regulate" their citizens. *New York*, 505 U.S. at 178.

The Court confirmed this principle in *Printz*. There, the dissenting opinion argued that the

Supremacy Clause required state officials to comply with Congress's directive to administer a federal gun law. 521 U.S. at 924. But this Court recognized that the Supremacy Clause "makes 'Law of the Land' only 'Laws of the United States which shall be made in Pursuance [of the Constitution],' Art. VI, cl. 2." *Ibid.* (alteration in original). Accordingly, "the Supremacy Clause merely brings us back to the question . . . whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution." *Id.* at 924–25. And the Court had previously "answered" that question in *New York*: "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Printz*, 521 U.S. at 924 (quoting *New York*, 505 U.S. at 166).

2. The Leagues and the United States attempt to confine the anti-commandeering principle to federal laws that affirmatively command States by telling them "what they *must do*," rather than "what they *must not do*." Leagues Br. 19; *see also* U.S. Br. 10. This, the United States asserts, is "the fundamental distinction between commandeering and preemption." U.S. Br. 10.

That formulation, which seeks to limit *New York* and *Printz* to their particular facts, badly misapprehends "the allocation of power contained in the Commerce Clause." *New York*, 505 U.S. at 166. That "allocation" "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce," *ibid.*, "[n]o matter how powerful the federal interest involved," *id.* at 178. Nor

can Congress "pre-empt contrary state regulation" without regulating the area "directly." *Ibid.* In the absence of direct federal regulation of the field, "state regulation" would not be "contrary" to federal law.

The "fundamental distinction between commandeering and preemption" is thus not whether Congress couches its legislation as a command "to do" or a prohibition "not to do," but instead whether the legislation regulates citizens "directly" or conscripts States to exercise *their own sovereign power* to regulate citizens "according to Congress' instructions." *New York*, 505 U.S. at 162. This conclusion follows from the "structure of the Constitution," *Printz*, 521 U.S. at 918, particularly the thoughtfully debated and carefully wrought decision "to substitute a national government acting . . . *directly on citizens*, instead of the Confederate government, *which acted only upon States*," *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868) (emphases added); *see also Maryland* v. *EPA*, 530 F.2d 215, 225 (4th Cir. 1975), *vacated on other grounds by EPA* v. *Brown*, 431 U.S. 99 (1977) (Philadelphia Convention rejected proposals that "would have enabled Congress to 'revise,' 'negative,' or 'annul' the laws of a state").

a. The command/prohibition distinction proffered by the Leagues and the United States is refuted by this Court's decisions. This Court has applied the anti-commandeering principle to invalidate federal laws that merely *prohibit* state action, *Coyle* v. *Smith*, 221 U.S. 559 (1911), while approving federal laws that *command* State action or State forbearance, *Reno* v. *Condon*, 528 U.S. 141, 150–51 (2000).

In *Coyle*, this Court held that Congress violated the Constitution by prohibiting Oklahoma from moving its capital for seven years as a condition for its admission to the Union. 221 U.S. at 563–64. The United States ignores *Coyle* entirely, and the Leagues dismiss it in a footnote as pertaining only to the "equal footing doctrine, not the anti-commandeering doctrine." Leagues Br. 27 n.4. But when the Court in *New York* held that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions," it cited *Coyle* alone for the proposition. 505 U.S. at 162 (citing *Coyle*, 221 U.S. at 565).

This Court's understanding of *Coyle* is correct. *Coyle* held that the equal-footing doctrine prohibited Congress from depriving newly admitted States of powers that the existing States possessed. The Court also concluded that Congress lacked authority to direct one of the original thirteen States in the "essentially and peculiarly state power" of "locating its own seat of government" and "determining when and how it shall be changed from one place to another." *Coyle*, 221 U.S. at 565; *see also ibid.* ("That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained."). That the Constitution forbids Congress's usurpation of the original States' sovereign powers through a federal prohibition is thus an indispensable aspect of the Court's holding in *Coyle* that Oklahoma was entitled to that same constitutional protection under the equal footing doctrine.

Reno likewise rejects the command/prohibition distinction. In *Reno*, the challenged federal law "*re-*

quire[d] disclosure of personal information" in specified circumstances, and the Court "agree[d]" that compliance with the federal law would "require time and effort on the part of state employees." 528 U.S. at 145, 150. The Court nevertheless rejected the commandeering challenge because the law did "not require the States . . . to regulate their own citizens," but instead regulated the States in their non-sovereign roles as "the owners of data bases" and "participa[nts] in the interstate market for personal information." *Id.* at 150 n.3, 151. *Reno* thus shows not that the anti-commandeering principle is "narrower . . . than the prohibition/command dichotomy suggests," Leagues Br. 26, but that it tracks the "allocation of power contained in the Commerce Clause" that allows Congress to "regulate interstate commerce directly" but not to "regulate state governments' regulation of interstate commerce," *New York*, 505 U.S. at 166.

b. The "prohibition/command dichotomy" also immediately collapses in application. Just as a prohibition against exhaling is a requirement to hold your breath, and a prohibition against sleeping is a command to stay awake, a prohibition against repealing a law is an unconstitutional requirement "to . . . maintain" that law. U.S. Br. 10; *see also Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) ("preventing [a] state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated").

The Court recognized as much in *South Carolina* v. *Baker*, 485 U.S. 505 (1988), where it accepted as the predicate for its Tenth Amendment analysis the fed-

eral government's concession that Congress's withdrawal of a tax exemption on bearer bonds operated as a "blanket prohibition . . . on the issuance of bearer bonds" that, in turn, "effectively require[d] States to issue bonds in registered form." *Id.* at 511. If the "prohibition/command dichotomy" were the key to the anti-commandeering principle, the Court would not have used the "prohibition" and "require[ment]" descriptors interchangeably because their difference would have been constitutionally dispositive. Instead, the Court rejected the commandeering challenge because the federal scheme was a "generally applicable federal regulation[]" of commerce that did not "seek to control or influence the manner in which States regulate private parties." *Id.* at 514.

c. The anti-commandeering principle ensures that each level of government is responsive to its respective constituents, that state and federal officials are accountable for their own policy decisions, and that power remains diffused across state and federal sovereigns. N.J. Br. 27–30. PASPA's prohibition on state lawmaking with respect to sports wagering violates each of these principles, while the command/prohibition dichotomy proffered by the Leagues and the United States is divorced from them.

Neither the Leagues nor the United States disputes that the concerns of responsiveness, accountability, and diffusion of power are fully implicated by a federal law that prohibits a State from repealing its own laws. And, the problems here are magnified by the injunction, which requires the State's Executive to maintain "in effect" repealed state-law prohibitions that he cannot effectively execute or enforce. The Leagues cavalierly dismiss these concerns, suggesting

that state officials confronted by disgruntled constituents "have an easy answer . . . : Call your [U.S.] Senator." Leagues Br. 53. The Leagues' suggestion that New Jersey constituents call *federal* officials regarding *New Jersey* laws starkly illustrates the extent of PASPA's takeover of the States' lawmaking function. Of course, if the blame-shifting suggested by the Leagues were sufficient, accountability concerns would have played no role in *New York* or *Printz*. But they did: This Court recognized that because Congress put state officials ("not some federal official") on the front lines of defending the federal policies, it would be the state officials who would "tak[e] the blame" for the federal policy's "burdensomeness and for its defects." *Printz*, 521 U.S. at 930. And so it is here, where the State's Executive must "stand[] between" New Jersey citizens and the sports wagering activity addressed in the 2014 Repeal. *Ibid.*

* * *

The Constitution's "allocation of power" among the federal government and the States is defined not by reference to the phraseology of Congress's regulations or the labels its lawyers subsequently invent to characterize its actions, but by the regulations' object and effect. *New York*, 505 U.S. at 166. If Congress wants to regulate sports wagering, it may and must do so itself; Congress cannot compel States to regulate "as its agents." *Id.* at 178.

3. The Leagues and the United States rely on several examples of express preemption provisions to argue that prohibitions on state regulation are commonplace. *See* Leagues Br. 34–35 & n.6; U.S. Br. 13 & nn.2–3. But in each cited instance, Congress directly

regulated the field of commerce and, to advance its direct regulation, preempted state laws that contravened or impeded its efforts. PASPA, as the United States acknowledges, "*did not adopt comprehensive regulations on sports gambling*." U.S. Br. 15 (emphasis added); *see also* Leagues Pet. Opp. at 33–34 (Congress chose "to assist states in their efforts to prevent sports and other gambling, rather than to *preempt the field entirely*") (emphasis added).[1]

Rather than regulating sports gambling directly, PASPA "nullifl[ies] state laws authorizing private sports gambling schemes." U.S. Br. 15. The United States defends the naked prohibitions on state licensing and authorization by law on the ground that they "enforce" the "same federal policy" of nullifying state laws authorizing private sports wagering. *Id.* at 16. That is obviously tautological—preemption effectuates a federal policy of preemption—yet the even more critical point is that PASPA does not establish *any* "federal policy" that directly regulates *individuals*. The provision that addresses individual conduct, Section 3702(2), targets only private conduct "pursuant to" state law and thus applies *if and only if* there are state laws governing sports wagering. By regulating individuals' participation in commerce only when a State seeks to regulate that commerce, Congress is attempting to regulate indirectly what *New York* says it

[1] The Leagues characterize the FDA regulations at issue in *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604 (2011), as preempting "any state law authorizing" "third-party conduct" that "conflicts with federal policy." Leagues Br. 35. In fact, what *PLIVA* held preempted were state laws that "*required*" a drug label different from that mandated by federal law. 564 U.S. at 611–12 (emphasis added).

may not regulate directly—state governments' regulation of interstate commerce. 505 U.S. at 166. The United States acknowledges as much when it says that Section 3702(2) is designed to "nullify state laws authorizing private sports-gambling schemes." U.S. Br. 15.

B. PASPA Impermissibly Requires New Jersey To Maintain Prohibitions On Sports Wagering.

The United States explicitly concedes that PASPA "would violate the Tenth Amendment if it commanded the States to . . . maintain prohibitions on sports gambling," U.S. Br. 8, but somehow pretends away the injunction that indisputably requires New Jersey to do exactly that. The Leagues and the United States claim that PASPA "does not require states to . . . *do* anything," Leagues Br. 20, because they are "free to repeal [their] sports-wagering laws altogether," U.S. Br. 9. That construction of PASPA is facially absurd and inconsistent with the Leagues' and the United States' argument that the more limited 2014 Repeal violates PASPA. Moreover, even if PASPA allowed the alternative of unregulated, unlimited sports wagering, that "option" is so manifestly and blatantly coercive that it would leave States with no choice at all.

1. Because PASPA was enacted to stop the spread of sports wagering, it cannot reasonably be construed to offer States an option of fully repealing all of their prohibitions on the activity and opening the field to a vast, uncontrolled universe of sports gambling.

The Congress that enacted PASPA disapproved of all sports wagering. S. Rep. 102-248, at 6 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3553 ("Congress has previously recognized on several occasions that gambling has no place in sports, professional or amateur."); *id.* at 8 ("the committee firmly believes that all such sports gambling is harmful"). In enacting PASPA, Congress was concerned chiefly with State *legalization* of any sports wagering, mentioning the threat posed by "legalized" sports wagering ten separate times. N.J. Br. 44.

The Senate Report does also mention sponsorship and operation of State-run sports-themed lotteries, which presumably is why PASPA *also* prohibits States from "sponsoring" or "operating" a sports wagering scheme. But PASPA's prohibition on "authoriz[ation] by law" of sports wagering gives effect to Congress's central concern about *legalization* of sports wagering, and its desire to burden the States with the responsibility of preventing it. *See* Sen. Bill Bradley, *The Professional & Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 Seton Hall J. Sport L. 5, 6 (1992) ("Just as legalizing drugs would lead to increased drug addiction, legalizing sports gambling would aggravate the problems associated with gambling.").

It is thus unsurprising that the legislative history nowhere suggests that PASPA gives States an "option" to repeal all of their prohibitions on sports wagering. Indeed, until New Jersey claimed that PASPA impermissibly commandeered, the Leagues had forthrightly described it as "bann[ing] sports betting in states that had not authorized such schemes in the

past." Br. of Appellees at 2, *Office of Comm'r of Baseball* v. *Markell*, 579 F.3d 293 (3d Cir. 2009) (No. 09-3297) 2009 WL 5635556. Even now, the Leagues say that PASPA prohibits any "expansion" of existing sports wagering schemes. Leagues Br. 41.

Continuing to improvise and evolve its construction of PASPA's prohibitions to meet the exigencies of this litigation, the United States (at 17) newly cites *County of Washington* v. *Gunther*, 452 U.S. 161 (1981), for the proposition that "authorize" requires "affirmative enabling action." *Id.* at 169; *see also* Leagues Br. 39 (citing dictionary definitions). The Leagues' and the United States' objection to the 2014 Repeal is that it "authorize[s]" sports gambling contrary to the statute, but they do not explain why a "full repeal" would not "authorize" in precisely the same way. In fact, a full repeal is *more* of an authorization-by-law than the 2014 Repeal, whether "authorize" is defined to require permission, empowerment, endorsement, or "affirmative enabling action." U.S. Br. 17–18, Leagues Br. 36–39. In both cases, the State is simply ceasing to prohibit conduct—the only difference is that a full repeal does so to a greater extent.

The United States and the Leagues contend that it is the 2014 Repeal's "selective" nature that makes it an authorization. U.S. Br. 17; Leagues Br. 2. But that defies their own examples of permissible repeals. For example, repeals on "prohibitions on sports gambling involving wagers by adults or wagers below a certain dollar threshold" are "selective," yet the United States claims that "one would not naturally say" that, in those instances, a State "had 'authorize[d] by law' sports-gambling schemes." U.S. Br. 29. The Leagues

and the United States offer no principled construction of the term "authorize by law" that permits full repeals while also prohibiting the 2014 Repeal.

2. Reading PASPA as a statute intended to give States an "option" to "fully repeal" all prohibitions on sports wagering would not save it, as that alternative is not one the federal government may impose on the States.

The Leagues (but not the United States) argue that PASPA should be viewed as a "cooperative federalism" regime—indeed, one "solicitous of state sovereignty"—that permits States to regulate in accordance with federal standards (by prohibiting sports wagering under state law) or to "yield the field to the federal government" by fully repealing all prohibitions. Leagues Br. 48–49, 51, 52. This argument fails for four independent reasons.

First, PASPA says it "shall be unlawful for" a State to "authorize by law . . . ." 28 U.S.C. § 3702(1). That is a flat prohibition; nothing in PASPA's text even remotely echoes the cooperative federalism statutes addressed in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *FERC* v. *Mississippi*, 456 U.S. 742 (1982).

Second, the field that PASPA's putative cooperative federalism regime "encourages" States to regulate—sports wagering by individuals—is not the field that PASPA supposedly "regulates comprehensively." Leagues Br. 49. As the Leagues acknowledge, PASPA regulates "states . . . authorizing sports-gambling schemes"; it "does not directly address sports wagering by individuals." *Ibid.* This Court's cooperative federalism cases do not allow the federal government

to bootstrap regulation in one "narrow field," *ibid.*, to encourage States to regulate a much broader field that the federal government has declined to regulate.

Third, the choice the Leagues imagine "amounts in reality to coercion" to continue prohibiting sports wagering at the State's casinos and racetracks. *Petersburg Cellular*, 205 F.3d at 703. The "choice" to ban sports wagering, or allow it but leave it completely unregulated (and accept the consequences of no regulation), is not merely a "difficult one," but in fact "coerc[es] the States into assuming a regulatory role." *FERC*, 456 U.S. at 766 (alteration in original, quotations omitted). Under this Court's decisions in *New York* and *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012), that coercion is "constitutionally determinative," even if it was not in the Court's earlier decision in *FERC* itself. *FERC*, 456 U.S. at 766.

Finally, *New York* establishes that where Congress lacks authority to impose either of two regulatory requirements on the States, it also "lacks the power to offer the States a choice between the two." 505 U.S. at 176. Here, the United States concedes that Congress may not compel States to maintain their prohibitions. U.S. Br. 8, 19. And Congress has no more power to compel States to repeal them. To be sure, Congress could *displace* those prohibitions with a regulatory—or deregulatory—regime of its own. *See, e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). But because it cannot command States to enact legislation, it cannot command States to exercise their legislative power to *repeal* state laws.

C. PASPA's Impermissible Prohibition On Repealing State Laws Cannot Be Avoided.

A telling indicator of PASPA's constitutional infirmity is that both the United States and the Leagues struggle to avoid the question presented. They offer a variety of creative statutory interpretations and urge adherence to the principle that "a statute must be construed to avoid constitutional problems. . . ." U.S. Br. 19 (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); Leagues Br. 38. True enough, but that principle cannot carry the day here. The proposed path to avoid PASPA's constitutional defect—to interpret the statute's prohibition against "authoriz[ing sports wagering] by law" to permit repeals of state-law prohibitions—is not a plausible interpretation of the statute. The United States' belated effort to suggest an alternative ground to affirm the judgment below—that the 2014 Repeal is an act of licensing—similarly lacks merit.

1. This Court may not avoid a constitutional defect in a statute by adopting a construction that is "plainly contrary to the intent of Congress." U.S. Br. 19 (quoting *Edward J. DeBartolo Corp.*, 485 U.S. at 575). Congress's manifest intent in enacting PASPA was to stop the spread of sports wagering and thereby protect the integrity of sports contests. N.J. Br. 42–44. An interpretation of "authoriz[ation] by law" that allows States to repeal their prohibitions on sports wagering—while simultaneously prohibiting States from regulating it—cannot be reconciled with this evident purpose. PASPA's text tells us that where sports wagering was to be legalized, Congress wanted it to take

place only "pursuant to a comprehensive system of State regulation." 28 U.S.C. § 3704(a)(3)(B).[2]

2. The United States briefly suggests, as an "alternative ground for affirmance," that the 2014 Repeal unlawfully "license[s]" sports wagering schemes. U.S. Br. 34. Yet, the United States saw no need to intervene in this action and as an *amicus*, it cannot advance arguments that are neither pressed by the parties nor passed upon below. *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 n.4 (2013). And the Leagues' passing mention of the argument, Leagues Br. 43 n.10, "does not develop it," so this Court should "not consider" it, *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 27 n.5 (2010).

The argument falters in any event because PASPA prohibits licensing only of a sports "wagering scheme," 28 U.S.C. § 3702(1), and unlike New Jersey's 2012 Law, the 2014 Repeal does not provide for the issuance of licenses of any kind, much less licenses to conduct sports wagering schemes, N.J. Br. 8, 10–12. The United States theorizes that because New Jersey, under *other* statutes, issues licenses to casino and race-

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[2] The Leagues claim that as long as Section 3702(2)'s prohibitions on private conduct stands, New Jersey's challenge to Section 3702(1) "would have little practical effect." Leagues Br. 54. But if "authorization by law" were construed to permit the 2014 Repeal, then sports wagering at New Jersey casinos and racetracks would result from the *absence* of state-law prohibitions, and thus would not be "pursuant to [] law" within the meaning of Section 3702(2) and the definition of "authoriz[ation]" now being advanced. The United States effectively concedes as much by acknowledging that sports wagering "left unregulated" is not conducted "pursuant to" law. U.S. Br. 18.

track operators for activities other than sports wagering, the repeal of prohibitions on sports wagering at those locations "'license[d]' those facilities to conduct sports-gambling schemes." U.S. Br. 34 (alteration in original). But merely lifting prohibitions on an activity is not the same as the State licensing the activity. To the contrary, because the prohibition has been lifted, no license for the activity is needed; people are *free* to engage in the activity. That, after all, is why the Leagues and the United States say a full repeal is not an "authorization by law."[3]

Indeed, if this "licensing" theory had any validity—and it does not—the logical remedy would be to command the State to cancel the offending licenses. That neither the Leagues nor the United States has ever sought that relief amply demonstrates that their interest lies not in preventing licensing of sports wagering (indeed, no such licensing exists in New Jersey), but its legalization.

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[3] The Leagues' licensing theory, however, exposes the "full repeal" option as a sham. After touting that "New Jersey is free to repeal its prohibitions on sports gambling," (by which they mean only a "full[] repeal," Leagues Br. 37), the Leagues say that, even then, New Jersey could not permit "license[d] casinos" to "offer sports-gambling schemes." *Id.* at 46 n.11. That can be true only if the *full repeal* is an impermissible "licens[ing]" of sports gambling schemes. U.S. Br. 34. But given that virtually every business in New Jersey is operated by someone who holds a license, that would leave New Jersey citizens few places to enjoy their new freedom to engage in sports wagering. The Leagues cannot argue that PASPA permits States to legalize sports wagering and simultaneously say that PASPA prohibits States from allowing sports wagering in places that hold licenses for other activities.

II. "AUTHORIZE BY LAW" CANNOT BE SEVERED FROM THE REMAINDER OF THE STATUTE.

The federal prohibition on state legalization of sports wagering is the centerpiece of PASPA, and once it is struck down as unconstitutional, the rest of the statute cannot function as Congress intended. The challenged provision therefore is not severable.

A. Severability turns on whether, after the unconstitutional provision has been excised, the remaining portions of the statute would be "fully operative as a law" and function "in a manner consistent with the intent of Congress." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684–85 (1987) (quotations omitted). Of course, when the Court finds "a constitutional flaw in a statute," it "tr[ies] to limit the solution to the problem." *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 508 (2010) (quotations omitted). But the inquiry is one of "legislative intent," *United States* v. *Booker*, 543 U.S. 220, 246 (2005), focusing on what Congress intended to accomplish and whether the remaining portions of the statute would advance that purpose, *NFIB*, 567 U.S. at 578. If it is "evident" that Congress "would not have enacted" the remaining provisions without the invalid one, *New York*, 505 U.S. at 186 (quotations omitted), or that the statutory leftovers would frustrate Congress's purpose, the Court cannot legislate the leftovers into law. *See, e.g.*, *Booker*, 543 U.S. at 258; *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 193–95 (1999).

B. Excising the prohibition on state legalization of sports wagering and permitting the rest of PASPA to remain would not be "consistent with Congress' basic objectives in enacting the statute," *Booker*, 543

U.S. at 259, namely, to prevent States from legalizing sports wagering. N.J. Br. 5–7; S. Rep. 102-248, at 3–8.

The prohibition on State legalization is at the heart of PASPA, and the enacting Congress would not have wanted to retain a remainder that would allow States to legalize sports wagering, but then prohibit States from supervising it to ensure that it is responsibly conducted. The Congress that wanted to force States to ban sports wagering entirely would not have wanted that result. Amicus Br. (Merits) of Am. Gaming Ass'n at 16–18 (explaining benefits flowing from State regulation of sports wagering). PASPA's text proves the point: In the provision designed to permit the possibility of sports wagering in Atlantic City, Congress specified that the wagering could occur only "pursuant to a comprehensive system of State regulation." 28 U.S.C. § 3704(a)(3)(B). And the regime permitted in Nevada was similarly a fully regulated one. S. Rep. 102-248, at 8, 10, 12. Accordingly, Section 3702(1)'s ban on licensing must fall with the ban on state legalization. *See* N.J. Br. 54–55.

Further, Congress would not have enacted Section 3702(2) without Section 3702(1)'s ban on state licensing and authorization by law. The two sections are textually linked: Section 3702(1) prohibits sports wagering from being "authorize[d] by law," and Section 3702(2) refers back to that "law." And the United States acknowledges that Section 3702(2)'s purpose is to "nullify" state laws prohibited by Section 3702(1). U.S. Br. 15. If Section 3702(2) is a "belt" to Section 3702(1)'s "suspenders," Leagues Br. 56, then the trousers are Congress's unconstitutional "federal policy" of prohibiting States from legalizing sports wagering under their own laws. Because the two parts of Section

3702 are "mutually dependent upon one another," they stand or fall together. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 313 (1936).

Moreover, if Section 3702(2) stood independently, it would make "unlawful" under federal law *only* conduct that is *lawful* under state law. That is a very dubious construction of Congress's intent because the broader corpus of federal laws regulating wagering (including sports wagering in particular) generally makes conduct unlawful only to the extent it is unlawful in the State in which it occurs. *See, e.g.*, 18 U.S.C. § 1084 (criminalizing transmission of wagering information only where it is not lawful as a matter of state law). The severance the Leagues and the United States propose would reverse this practice without any indication that Congress intended that result.[4]

C. The Leagues (at 54–59) and the United States (at 31–35) argue that even if PASPA's other prohibitions fall, its provisions prohibiting States from sponsoring or operating sports wagering schemes should survive. But if Congress could not achieve its primary

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[4] Contrary to the Leagues' suggestion, the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5361 *et seq.*, does not prohibit "as a matter of federal law" sports wagering that is "lawful under state law." Leagues Br. 5–6. The UIGEA does not prohibit sports wagering at all; it prohibits *money transfers* arising from "unlawful internet gambling." 31 U.S.C. § 5363. And only wagers that are "unlawful under any applicable Federal or State law" fall into that category. *Id.*, § 5362(10)(A). There is no federal law that directly prohibits sports wagering of the type allowed by the 2014 Repeal unless it is independently unlawful under state law. That, of course, is why the Leagues invoked PASPA to enjoin New Jersey's 2014 Repeal—to keep sports wagering "unlawful" in New Jersey.

goal of stopping States from legalizing sports wagering, it is unlikely Congress would have wanted to take away States' ability to operate wagering schemes themselves, which may be a State's surest means of ensuring that they are operated responsibly and safely.

* * *

A Congress interested in stopping the spread of legalized sports wagering "would not have enacted" a statute that would permit completely unregulated sports wagering while outlawing closely regulated sports wagering. *New York*, 505 U.S. at 186. Nor would that Congress have enacted a law selectively penalizing third parties in States where sports wagering is legal, while leaving unaffected those where sports wagering is either illegal or decriminalized. Section 3702 therefore must be struck down in its entirety.

CONCLUSION

Because PASPA unconstitutionally commandeers the States and because its unconstitutional provisions are not severable, the Court should reverse the Third Circuit's decision.

Respectfully submitted,

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November 15, 2017

APPENDIX

APPENDIX

UNITED STATES COURT DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, [et al.], *Plaintiffs*, v. CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, [et al.], *Defendants*. * * * * * * February 14, 2013	[No.]: 3:12-CV-04947-MAS-LHG [Transcript of Hearing, Dist. Ct. Dkt. 145]

* * *

[106] THE COURT: Please be seated, folks. I had an opportunity to take a quick look at my notes here. I only have one follow-up question, and it's really for the plaintiffs and the Department of Justice. And that is whether or not -- I want to make sure that we're clear as to whether or not you're contending that there is any kind of regulatory scheme in place as a result of either the criminal laws and PASPA combined or the like. I need to just kind of make sure I'm clear on that whole issue if you are asserting that. You may not be at all.

MR. FISHMAN: I think it's my view, Judge, that there is no regulatory scheme in place in New Jersey because of PASPA, okay. New Jersey has a regulatory scheme in place that is comprised, as I understand it - I'm a federal prosecutor, not a state prosecutor - of criminal laws and civil sanctions that determine what people can and can't do. Those laws have morphed over time as the state legislature has seen fit to [107] amend them.

We're not, by the way, as Mr. Griffinger said, contending that the legislature is frozen in time in 1992. The legislative history and the rational-basis question that you asked, is frozen in time in 1992. But the legislature can continue to tinker with state gambling laws. And it has a regulatory scheme, but it's not a regulatory scheme because of PASPA. It has a regulatory scheme because it is good, sound state government to have a regulatory scheme that involves gambling. Because, as Mr. Olson points out, having people running a muck, gambling illegally is not a healthy

thing. And the Department of Justice certainly doesn't want that either.

THE COURT: But to the extent that we're talking about any kind of Supremacy Clause analysis for preemption purposes, are you contending that there is any kind of regulatory scheme in place?

MR. FISHMAN: No. If I might clarify, I don't think anybody is arguing the actual Doctrine of Preemption because there is a whole law of preemption out there that Mr. Olson is probably way more familiar with than I am, and there are different kinds of preemption. We are simply arguing there is a Supremacy Clause issue here. Congress has said, you can't do this, and all the states must follow that command. I will say that, no, there is a regulatory regime that New Jersey has [108] in place, not because of PASPA. It can enforce that regulatory regime to the extent that it deems it is appropriate to do that or not given what other resource constraints it has. And PASPA does not compel them to do more or to do less in that regard.

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RECORD AND BRIEFS

No. 16-476

IN THE

Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners respectfully submit this supplemental brief pursuant to this Court's Rule 15.8 to respond to the invited brief of the United States.

The brief of the United States confirms the urgent need for this Court's review. Though it cannot cite a single example (other than this case) of federal law ever being applied to enjoin a State from repealing its own state-law prohibitions on private conduct, the federal government unabashedly claims the authority to "preempt" any "repeal of existing law" that has "prohibited features" or "results." U.S. Br. 18, 19. In other words, States may *not* repeal their own laws except "according to Congress's instructions." *New York* v. *United States*, 505 U.S. 144, 162 (1992).

That startling view of dual sovereignty is deeply destructive of our federalist system and it is incompatible with this Court's anti-commandeering precedents.

It also is a flat-out recantation of what the Solicitor General told this Court just three years ago in *Christie I*. There, in response to Petitioners' argument that PASPA impermissibly commandeered the States by requiring them to maintain prohibitions on sports wagering, the Solicitor General reassured this Court that PASPA did nothing of the sort because it left States "free to repeal those prohibitions in whole or in part." U.S. Br. in Opp. at 11, *Christie I*, Nos. 13-967, 13-979, and 13-980 (U.S. May 14, 2014) ("*Christie I* U.S. BIO"). Now, the Acting Solicitor General says that, "in context," what the government "meant" is that States are "free to repeal those prohibitions . . . in part" only to the extent the State's repeal "is not a *de*

facto authorization." U.S. Br. 14, 15 (internal quotation marks omitted).

But that new spin is irreconcilable with the government's arguments in the court of appeals. There, the government never even remotely suggested that a repeal could be a "*de facto* authorization." The government, in fact, took the opposite position: Because PASPA prohibits only "authoriz[ing] *by law or compact*," a "repeal . . . would not constitute such an 'authorization' because there would be no State statute or compact granting anyone authorization to conduct sports wagering." U.S. Br. at 29, 30, *Christie I* (3d Cir. 2014) ("*Christie I* U.S. Br."). Indeed, the government continued, "by reading PASPA to require States to maintain their existing sports gambling prohibitions, New Jersey proffers an interpretation that would create ***substantial constitutional doubt***. Consequently PASPA cannot be properly read to require New Jersey to maintain or enforce prohibitions on sports wagering." *Id.* at 31 (emphasis added).

The *Christie I* panel adopted this argument wholesale, acknowledging that reading PASPA to require New Jersey to "keep a ban on sports gambling in [its] books" would "raise a series of constitutional problems." Pet. App. 160a. But it concluded it could avoid those problems because New Jersey's view of PASPA's requirements "rest[ed] on a false equivalence between repeal and authorization and reads the term 'by law' out of the statute." *Ibid.* Opposing review of that decision, the Solicitor General defended that analysis as "correct." *Christie I* U.S. BIO 9. *That* is the "context" in which the Solicitor General argued to this Court that, under PASPA, States were free to repeal their sports-wagering prohibitions "in whole or in part,"

and that "*therefore* . . . PASPA does not commandeer the governmental machinery of New Jersey." *Id.* at 11 (emphasis added).

The government's opportunistic evolution of its position is obvious and irrefutable. But so is the "substantial constitutional doubt" it "create[s]." *Christie I* U.S. Br. 31. The government does not acknowledge that doubt now, of course, but that is why this Court's review is needed. The metes and bounds of the States' reserved sovereignty should be clear and enduring—not subject to the federal government's creeping incursions under the cover of morphing interpretations of federal statutes. The petitions should be granted.

I. The Lower Courts' Unprecedented Injunction of a Repeal of State-Law Prohibitions Deeply Undermines State Sovereignty

1. The United States does not—because it cannot—deny that Congress "lacks the power directly to compel the States . . . to prohibit" acts that Congress has authority to prohibit directly. *New York*, 505 U.S. at 166. But it argues that PASPA is "'consistent with the constitutional principles enunciated in *New York* and *Printz*,'" because it "'does not require the States in their sovereign capacity to regulate their own citizens.'" U.S. Br. 14 (quoting *Reno* v. *Condon*, 528 U.S. 141, 151 (2000)).

Yet as construed by the Third Circuit here, that is precisely what PASPA does. Indeed, the United States itself acknowledges that "a federal statute and a federal court have effectively required New Jersey 'to maintain state-law prohibitions that its elected officials chose to lift.'" U.S. Br. 18 (quoting Pet. 3). And

that *is* requiring States "to regulate their own citizens." There is no daylight between the two.

This is no mere federalism foot fault. As this Court observed in *FERC* v. *Mississippi*, "having the power to make decisions and to set policy is what gives the State its sovereign nature" and is "central to a State's role in the federal system." 456 U.S. 742, 761 (1982). Now, however, a federal-court injunction is authoring the contents of the State's prohibitions on sports wagering, wresting from the State's Legislature its sovereign authority over its State's laws and reducing its officials to "puppets of a ventriloquist Congress." *Printz* v. *United States*, 521 U.S. 898, 935 (1997) (quotation omitted). That reordering of our system of federalism warrants this Court's review.[1]

2. Though it cannot muster even one other example of a federal law being applied to enjoin a repeal of state law, the United States suggests that federal statutes prohibiting repeals of state law, in fact, are "commonplace." U.S. Br. 10. That is because the government now has redefined preemption to include the

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[1] The government argues that Section 3702(1) is a law that "permissibly 'pre-empt[s] state laws regulating private activity.'" U.S. Br. 14 (quoting *Hodel* v. *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981)). But a repeal manifestly is not a law that *regulates* private activity and *Hodel* cannot otherwise be read to authorize a federal law commanding the States to maintain state-law prohibitions. *See* Pet. 26–28. Nor can the government draw support from *South Carolina* v. *Baker*, 485 U.S. 505 (1988), which recognized that the federal government may not "seek to control or influence the manner in which States regulate private parties." *Id.* at 514. That, undeniably, is what the lower courts' injunction does.

power to forbid a "repeal of existing law" that has "prohibited features" or "results." U.S. Br. 18, 19.[2]

At the level of first principles, the notion of federal preemption of a *repeal* of state law is nonsensical. As Judge Fuentes pointed out in his dissent, "[a] repealed statute is treated as if it never existed; a partially repealed statute is treated as if only the remaining part exists." Pet. App. 68a–69a; *see also id.* at 69a n.6 (citing *Ex Parte McCardle*, 74 U.S. 506, 514 (1868)). Federal law can conceivably displace only that which exists.

The government nevertheless argues that where a repeal of state law leads to a "result[]" prohibited under federal law, the repeal is preempted. U.S. Br. 19. To prove the point, the government invokes 15 U.S.C. § 391, which provides that "[n]o State . . . may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity." The government supposes that, if a State repealed a tax on electricity only as "applied to in-state entities," it validly could require the State to "maintain" the repealed tax because Section 391 prohibits the discrimination that "results from the partial repeal." U.S. Br. 19.

The government's claim to this authority under Section 391 is dubious, at best. When a State is held to violate Section 391, the out-of-state ratepayers are awarded relief from the discriminatory tax imposed by

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[2] Notably, unlike the Leagues, the Acting Solicitor General nowhere disputes that the 2014 Act is a "true" repeal. Leagues' BIO 30; *see also* Pet. Reply 8 n.1.

the State. *See, e.g., Arizona Public Serv. Co.* v. *Snead*, 441 U.S. 141, 150 (1979). The government cites no case under Section 391 in which a federal court has commanded a State to maintain or raise taxes on in-state entities, and New Jersey is not aware even of a case in which a ratepayer has sought such extraordinary relief.[3]

Yet, the arresting assertion of federal power reflected in the government's reading of Section 391 amply demonstrates the danger of its theory to our federalist system of dual sovereigns. If the anti-commandeering doctrine permits the federal government to compel a State ***to raise taxes*** on its citizens, then the lines of accountability between citizens and their elected officials that the doctrine protects would be in grave peril, indeed. That federally imposed state tax would not be collected by the Internal Revenue Service; it would be levied by state taxation authorities, who surely would "suffer the consequences" of the undoubtedly "unpopular" policy of collecting a tax the Legislature had repealed. *New York*, 505 U.S. at 168.

So too, under PASPA, which, as construed by the Third Circuit, compels New Jersey officials to maintain a ban on sports wagering activities that the Legislature has repealed. While the federal authors of New Jersey's ban remain out of "view of the public," *New York*, 505 U.S. at 168, Petitioners are left to "tak[e] the blame," *Printz*, 521 U.S. at 930. Our constitutional structure does not permit that result, and

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[3] Similarly, the government cites no case under any of its "[e]quivalent examples," U.S. Br. 12 n.5, 19 n.6, in which a State has been enjoined from repealing a state law, and New Jersey is aware of no such case.

the government's suggestion here that it does only confirms its broad departure from any accepted understanding of state sovereignty and the need for this Court's review.

3. The government suggests that PASPA passes constitutional muster because, even though PASPA prohibits New Jersey's "'specific partial repeal,'" PASPA still "'allows states to choose among many different potential policies.'" U.S. Br. 16 (quoting Pet. App. 23a). That is incorrect for two independent reasons.

First, Congress simply "lacks the power directly to compel the States . . . to prohibit . . . acts." *New York*, 505 U.S. at 166. It follows that Congress lacks the power to bar the States from repealing prohibitions on such acts because "in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). An impermissible federal requirement that States prohibit sports wagering in casinos is not sanitized by the suggestion that States may be able to lift prohibitions on sports wagering in other venues. Nor can Congress circumvent the restriction by attaching onerous conditions to the State's lifting of particular prohibitions. *Cf. Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2602-2603 (2012) (opinion of Roberts, C.J.); *see also* Pet. 28 n.4. Thus, the government's suggestion that federal law might permit New Jersey to lift its prohibitions on sports wagering in casinos and racetracks if it were willing to "repeal its prohibition on sports gambling altogether," U.S. Br. 15, or at a broader range of venues, does not cure the constitutional problem.

Second, under the Third Circuit's construction of PASPA, the "'many different potential policies'" supposedly available to the State are illusory. U.S. Br. 8 (quoting Pet. App. 23a); *see also* Pet. 32–34; Pet. Reply 12. The Third Circuit concluded that New Jersey's repeal constituted an "authorization" under PASPA because it "selectively grants permission to certain entities to engage in sports gambling," Pet. App. 14a—something that necessarily would be true of any repeal "in part." *Christie I* U.S. BIO 11; *see also* Pet. App. 13a (citing dictionary definition of "authorize"). And, though the Acting Solicitor General seems to forget it now, below the United States argued that any repeal intended to promote economic development violates PASPA, which would seem to take off the table even a complete repeal of all sports wagering prohibitions. U.S. Amicus at 9, *Christie II* (3d Cir. 2015). Indeed, all the government is willing to concede PASPA permits is the ability to "lift[] state penalties on informal or social wagering"—though why that is not also a "*de facto* authorization" is never explained. U.S. Br. 15.

The government argues that Petitioners cannot complain about this "lack of clarity," repeatedly claiming that Petitioners do not seek "review of the court of appeals' statutory holding." U.S. Br. 9, 15, 16, 21. But the government cannot have it both ways. If the range of "potential policies" available to the States is relevant to the commandeering analysis (as the Third Circuit evidently thought, *see* Pet. App. 23a), then so is

the correct construction of the statute that defines the policy options that are available to States.[4]

The government's suggestion that New Jersey asked the court of appeals to "opine on hypothetical cases or laws," U.S. Br. 21, is disingenuous. What New Jersey sought was a clear interpretation of PASPA in view of the Tenth Amendment that would clarify what repeals of state-law sports-wagering prohibitions PASPA permits. The Third Circuit replied, in substance, "not yours." The continuing confusion with respect to the State's ability to exercise its police power in an area of significant social and economic importance amplifies the need for this Court's review.

II. The United States' Remaining Arguments Are Insubstantial

The United States offers just two non-merits reasons to deny review. Neither withstands scrutiny.

1. The United States observes that there is no split of authority concerning the constitutionality of

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[4] Moreover, though Petitioners' challenge is directed to the constitutionality of PASPA as interpreted by the Third Circuit, that does not preclude the Court from reviewing that interpretation as a matter of constitutional avoidance. *See Nat'l Fed'n of Indep. Bus.*, 132 U.S. at 2593. That, after all, was the approach the Third Circuit—at the urging of the United States—took to resolve New Jersey's constitutional challenge in *Christie I*. And the Court would not need to strain to conclude that New Jersey's repeal, even if it could be labeled a "*de facto* authorization," U.S. Br. 15, is not an "authoriz[ation] by law." 28 U.S.C. § 3702(1). Indeed, though the government now argues the 2014 Act's "partial repeal" is "equivalent" to an authorization by law, U.S. Br. 17, the Solicitor General previously embraced as "correct," the Third Circuit's rejection of that "false equivalence" because it reads "by law" out of the statute. *See supra* p. 2.

PASPA. U.S. Br. 21–22. But as demonstrated above and in the petition, the decision below conflicts directly with the bedrock principle of federalism that Congress may not "regulate state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166. This Court did not await a circuit split before reviewing the challenge to the statute at issue in *New York*, *see* Pet. Reply 12–13, nor did it demand that New York's challenge to the federal requirement be duplicated by other States, *see New York*, 505 U.S. at 154 (noting States' compliance with the federal legislation). The Court granted review to address "the proper division of authority between the Federal Government and the States." *Id.* at 149. The federal intrusion into state sovereignty in this case– a federal court directly determining the contents of a State's laws—is at least as great as that presented by the "take title" provision in *New York*, and review is at least as warranted.

2. The United States argues that the question presented has "limited practical significance," U.S. Br. 10, because, even if Section 3702(1) is invalid, Section 3702(2) independently would ban the sports wagering as to which New Jersey has lifted its own prohibitions. U.S. Br. 22–23. That is both incorrect and irrelevant.

It is incorrect because, as explained in *Christie I*, Section 3702(2) reaches only private activity conducted "pursuant to state law." Pet. App. 166a. Under New Jersey's repeal (quite unlike the licensing scheme at issue in *Christie I*) any sports wagering that takes place would happen not "pursuant to" state law, but because of its *absence*. This explains why the

Leagues never sued petitioners in Case No. 16-477 under Section 3702(2), *see* Dist. Ct. D.E. 1 ¶ 59, and why the Leagues and the United States instead have persisted in their demands that New Jersey itself continue to prohibit sports wagering.[5]

In any event, whether Section 3702(2) prohibits sports wagering by private persons as a matter of federal law is utterly irrelevant to the question presented, which is whether the federal government can continue to compel *New Jersey* to prohibit its citizens from engaging in those activities. If the government is correct and Section 3702(2) prohibits New Jersey's casinos and racetracks from engaging in sports wagering regardless of whether New Jersey continues to prohibit that activity, then invalidation of Section 3702(1) finally would task the federal government with administering and enforcing its own proscription against sports wagering. The end of the federal government's conscription of the States' legislative apparatuses to impose that prohibition, and the restoration of an appropriate line of accountability for it to federal officials, would have immense "practical significance" to Petitioners, the people of the State of New Jersey, and to our system of federalism.

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[5] Section 3702(2) also does not prohibit sports wagering "independently" of Section 3702(1) because, as Petitioners previously argued below, Section 3702(1) is not severable. State Opening Br. at 53–54 & n.9 (3d Cir. 2013).

CONCLUSION

The Court should grant the petitions.

Respectfully submitted,

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Nos. 16-476 and 16-477

In the Supreme Court of the United States

CHRISTOPHER J. CHRISTIE, GOVERNOR OF NEW JERSEY, ET AL., PETITIONERS

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC., PETITIONER

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. 3701 *et seq.*, makes it unlawful for States and other governmental entities to "sponsor, operate, advertise, promote, license, or authorize by law or compact," sports-gambling schemes. 28 U.S.C. 3702(1). PASPA also prohibits private persons from operating sports-gambling schemes pursuant to state law. 28 U.S.C. 3702(2). The question presented is whether PASPA's preemption of state laws authorizing sports-gambling schemes violates the Tenth Amendment.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in these cases because they involve a constitutional challenge to a federal statute. At the Court's invitation, the Acting Solicitor General filed an amicus brief on behalf of the United States at the petition stage.

STATEMENT

A. The Professional And Amateur Sports Protection Act

In 1992, Congress enacted the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. 3701 *et seq.* At the time, States facing budget problems were "considering a wide variety of State-sponsored gambling schemes," including state sports lotteries and state-authorized private schemes like "casino-style sports books." S. Rep. No. 248, 102d Cong., 1st Sess. 5 (1991) (Senate Report). Congress concluded that "State-sanctioned sports gambling w[ould] promote gambling among our Nation's young people," and it sought to halt the spread of sports gambling "sponsored or authorized by a State." *Id.* at 4, 6.

PASPA imposes separate restrictions on States and private parties. States and other governmental entities may not "sponsor, operate, advertise, promote, license, or authorize by law or compact" sports-gambling schemes. 28 U.S.C. 3702(1). Private parties may not "sponsor, operate, advertise, or promote" sports-gambling schemes "pursuant to the law or compact" of a governmental entity. 28 U.S.C. 3702(2). Subject to limited exceptions, both sets of restrictions apply to any "lottery, sweepstakes, or other betting, gambling, or wagering scheme" based on professional or amateur sports. 28 U.S.C. 3702; see 28 U.S.C. 3704(a)(4).

PASPA is enforceable only through civil suits for declaratory or injunctive relief. The Attorney General may sue to enjoin violations of the statute, and sports leagues may seek injunctions against violations involving their games. 28 U.S.C. 3703.

Congress included a grandfathering provision that exempted a few then-existing state-run sports lotteries, 28 U.S.C. 3704(a)(1), and casino-based sports-gambling

in Nevada, which was "authorized by a [Nevada] statute" when PASPA was enacted, 28 U.S.C. 3704(a)(2). See Senate Report 8. Congress also provided an exception for casino-based sports gambling authorized by New Jersey within one year of PASPA's effective date. 28 U.S.C. 3704(a)(3). New Jersey did not avail itself of that exception. Pet. App. 4a.

B. The 2012 Act And *Christie I*

1. New Jersey's constitution generally provides that "[n]o gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof" have been approved by voters. Art. IV, § 7, Para. 2. The constitution has long included exceptions allowing the legislature to "authorize by law" casino gambling in Atlantic City and betting at racetracks. *Id.* Para. 2(D) and (F). Until recently, there was no comparable exception for sports gambling, and such gambling was expressly prohibited by statute. Pet. App. 4a; see N.J. Stat. Ann. § 2A:40-1 (West 2010).

In 2011, New Jersey amended its constitution to allow the legislature to "authorize by law" sports gambling at casinos and racetracks. N.J. Const. Art. IV, § 7, Para. 2(D) and (F). The legislature may not authorize gambling on college events held in New Jersey or involving New Jersey teams. *Ibid.*

After the amendment, the New Jersey Legislature enacted the 2012 Sports Wagering Act (2012 Act), 2011 N.J. Laws 1723-1730. The 2012 Act authorized licensed casinos and racetracks to conduct sports gambling under the regulatory framework governing their other gambling activities. *NCAA* v. *Governor of N.J.*, 730 F.3d 208, 217 (3d Cir. 2013) (*Christie I*), cert. denied, 134 S. Ct. 2866 (2014).

2. The Nation's principal professional sports leagues and the National Collegiate Athletic Association, respondents here, filed a suit challenging the 2012 Act under PASPA. The defendants, who are petitioners here, included state officials and the New Jersey Thoroughbred Horsemen's Association (NJTHA), a racetrack operator that wished to conduct sports gambling. *Christie I*, 730 F.3d at 217.[1]

Petitioners did not deny that the 2012 Act conflicted with PASPA by "licens[ing]" or "authoriz[ing] by law" sports-gambling schemes. 28 U.S.C. 3702(1). Instead, they argued that Section 3702(1) violated the Tenth Amendment's anti-commandeering rule. The district court rejected that argument and enjoined the 2012 Act. *Christie I*, 730 F.3d at 217.

3. A divided panel of the court of appeals affirmed. *Christie I*, 730 F.3d at 226-237. Contrasting PASPA with statutes that this Court has found to violate the anti-commandeering rule, the court noted that Section 3702(1) "does not *require* or coerce the states to lift a finger" because "they are not required to pass laws," "to expend any funds," or to "enforce federal law." *Id.* at 231. Instead, "PASPA sets forth a prohibition" barring States from licensing or authorizing sports gambling. *Ibid.* The court emphasized that "statutes prohibiting the states from taking certain actions have never been struck down" on commandeering grounds. *Ibid.*

The court of appeals rejected petitioners' contention that Section 3702(1)'s preemption of state laws "authoriz[ing]" sports-gambling schemes requires States to

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[1] Although there are some differences between petitioners here and the defendants in *Christie I*, see Pet. App. 6a n.2, we refer to both groups as "petitioners" for simplicity.

enact, maintain, or enforce prohibitions on sports gambling. *Christie I*, 730 F.3d at 232. The court explained that, under Section 3702(1), "a state may repeal its sports wagering ban" or "keep a complete ban," while "decid[ing] how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be." *Id.* at 233.

C. The Present Controversy

1. Three days after this Court declined to review the Third Circuit's decision, the New Jersey Legislature passed a bill purporting to "partially repeal[]" the State's prohibitions on sports gambling to the extent they applied at racetracks and casinos. Pet. App. 83a (brackets and citation omitted). Governor Christie vetoed that bill, calling it "a novel attempt to circumvent the Third Circuit's ruling." J.A. 128. Two months later, the legislature passed another bill with the same features. S. 2460, 216th Leg. (N.J. 2014) (2014 Act). Pet. App. 218a-222a. This time, the Governor signed the bill into law.

The 2014 Act purports to repeal all New Jersey gambling laws "to the extent they apply" to sports gambling that meets five conditions: (1) it is conducted "at a casino or gambling house" in Atlantic City or a "horse racetrack"; (2) it consists of wagering by persons "situated at such location"; (3) the persons placing wagers are over 21; (4) the operator of the casino or racetrack consents to the scheme; and (5) the scheme does not include wagers on New Jersey college events. Pet. App. 219a-220a.

2. Respondents sued again, arguing that the 2014 Act conflicts with Section 3702(1) by "licens[ing]" and "authoriz[ing] by law" sports-gambling schemes. The district court held that New Jersey had impermissibly

authorized sports gambling and enjoined state officials from "giving operation or effect" to the 2014 Act. Pet. App. 113a; see *id.* at 76a-113a.

3. A divided panel of the court of appeals affirmed. Pet. App. 47a-75a. The court then granted rehearing en banc and affirmed by a 9-3 vote. *Id.* at 1a-46a.

a. The en banc court held that the 2014 Act conflicts with PASPA because it "authorize[s] by law" sports gambling. Pet. App. 12a-16a. The court explained that although the 2014 Act is "artfully couched in terms of a repealer," it "essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling." *Id.* at 14a. Focusing on substance rather than form, the court held that the 2014 Act "is an authorization." *Ibid.*

The en banc court acknowledged that some language in *Christie I* suggested that, as a categorical matter, "a repeal *cannot* constitute an authorization." Pet. App. 13a (emphasis added). The court rejected that suggestion as "unnecessary dicta." *Id.* at 23a. It explained that "a state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization.'" *Ibid.* And because the court held that the 2014 Act impermissibly authorizes sports gambling, it did not address respondents' alternative argument, also made by the United States as amicus curiae, that the 2014 Act "license[s]" sports gambling by permitting it only at facilities licensed to conduct other gambling. *Id.* at 16a n.7.

The en banc court reaffirmed *Christie I*'s holding that PASPA "does not run afoul of anti-commandeering principles." Pet. App. 18a. The court explained that "PASPA does not command states to take affirmative

actions," such as enacting or maintaining prohibitions on sports gambling. *Id.* at 23a. It added that PASPA does not put States to a "binary choice" between repealing their prohibitions on sports gambling entirely or retaining total bans. *Id.* at 24a. Instead, "PASPA allows states to 'choose among many different potential policies on sports wagering that do not include licensing or affirmative authorization by the State.'" *Id.* at 23a (brackets and citation omitted).

b. Judge Fuentes, joined by Judge Restrepo, dissented, concluding that the 2014 Act does not conflict with Section 3702(1). Pet. App. 27a-34a. Judge Vanaskie dissented separately, concluding that Section 3702(1) violates the Tenth Amendment. *Id.* at 35a-46a.

SUMMARY OF ARGUMENT

I. Section 3702(1)'s preemption of state laws authorizing sports-gambling schemes does not violate the Tenth Amendment.

A. Congress may not commandeer the States by *requiring* them to enact, maintain, or enforce specific federally prescribed regulations. It may, however, *prohibit* States from adopting laws that conflict with federal policy. Those preemptive statutes constrain the States' legislative freedom by placing some policies out of bounds. And if a State transgresses those boundaries by amending its laws in a manner that is found to be preempted, state law may revert to its pre-amendment status until the legislature can act again. But that is not commandeering; it is the necessary result of the Supremacy Clause.

B. When Congress enacted PASPA, many States were considering state-sanctioned sports gambling as a solution to their fiscal problems. Congress responded by prohibiting States themselves from operating sports-

gambling schemes and prohibiting private parties from operating such schemes pursuant to state law. As petitioners do not dispute, those direct federal regulations of activities affecting interstate commerce do not raise any Tenth Amendment concern. In Section 3702(1), Congress also preempted state laws that "license" or "authorize by law" sports-gambling schemes. Like all preemptive legislation, that prohibition blocks some States from adopting their favored policies. It is not commandeering, however, because it does not conscript the States to enact, maintain, or enforce any particular laws. States need only *refrain* from licensing or authorizing by law sports-gambling schemes.

C. Petitioners' primary Tenth Amendment challenge to Section 3702(1) is that it is not a preemption provision at all. They incorrectly insist that States "authorize by law" sports gambling whenever they fail to prohibit it, and that Section 3702(1) thus must be construed as "a direct command to States to prohibit sports betting." NJTHA Br. 34-35. To the contrary, when Section 3702(1) speaks of "authorization *by law*," it naturally refers to "affirmative enabling action." *County of Washington* v. *Gunther*, 452 U.S. 161, 169 (1981). And any doubt about the most natural reading of Section 3702(1) would be eliminated by the cardinal principle that statutes must be construed to avoid, not create, constitutional problems. Section 3702 would violate the Tenth Amendment if it commanded the States to enact or maintain prohibitions on sports gambling. That problem evaporates if the statute is construed to preempt state laws that affirmatively authorize sports-gambling schemes.

D. Section 3702(1) validly preempts the 2014 Act. New Jersey wishes to do what PASPA prohibits: to authorize sports gambling at its licensed casinos and racetracks. Had New Jersey implemented that policy through a new provision expressly authorizing those facilities to engage in sports gambling or granting them an exemption from its gambling laws, there would be little question that the State had "authorize[d] by law" sports gambling. The analysis is no different now that New Jersey has reached the same substantive policy through a purported "partial repeal." The 2014 Act is preempted because it is, in substance, an "authoriz[ation] by law" of sports-gambling schemes at a handful of state-licensed facilities. The fact that Section 3702(1) prevents New Jersey from effectuating this particular "partial repeal" is not commandeering, because it imposes no greater constraint on the State's legislative freedom than any federal statute disabling a State from adopting its preferred policy. New Jersey is free to repeal its sports-wagering laws altogether, to keep them on the books unchanged, or to amend them in any manner that does not "license" or "authorize by law" sports-gambling schemes.

II. Even if Section 3702(1)'s preemption of state laws authorizing sports-gambling schemes were invalid, PASPA's remaining provisions would be severable and would independently preempt the 2014 Act.

A. New Jersey asserts (Br. 53) that if Section 3702(1)'s prohibition on state laws authorizing sports-gambling schemes is invalid, PASPA must be "struck down in its entirety." That remarkable assertion inverts this Court's approach to severability. There is no basis for invalidating PASPA's remaining provisions because those provisions would remain fully functional

and would continue to serve Congress's objectives. Indeed, the statute's practical effect would be largely unchanged. Section 3702(1) would still prohibit States from operating sports-gambling schemes themselves. And although a state law authorizing private sports-gambling schemes would not be expressly preempted by Section 3702(1), Section 3702(2) would still prohibit any private party from conducting the schemes the law purported to authorize.

B. Throughout this litigation, respondents and the United States have argued that the 2014 Act violates Section 3702(1)'s prohibition on state laws that "license" sports-gambling schemes because it allows sports gambling only at licensed casinos and racetracks. Petitioners have never offered any persuasive response. And because it is severable, Section 3702(1)'s independent prohibition on state laws that "license" sports gambling provides a ready alternative ground for upholding the Third Circuit's determination that the 2014 Act is validly preempted.

ARGUMENT

I. SECTION 3702(1)'S PREEMPTION OF STATE LAWS AUTHORIZING SPORTS-GAMBLING SCHEMES DOES NOT VIOLATE THE TENTH AMENDMENT

This case turns on the fundamental distinction between commandeering and preemption. Congress may not *require* States to enact or maintain federally prescribed regulations. But it may—and routinely does—*prohibit* States from adopting laws that conflict with federal policy. Although those preemptive statutes necessarily constrain the States' legislative latitude, they are not impermissible commandeering because they do not conscript the States to act as federal agents. To be

sure, when a State modifies its laws in a way that a federal statute does not permit, state law may revert, at least temporarily, to its pre-amendment status. But *that* is not commandeering; it is the necessary consequence of the Supremacy Clause.

New Jersey believes that the State's economic interests would be best served by authorizing sports gambling at its casinos and racetracks. Whatever the merits of that policy, Congress has placed it off limits in an exercise of its authority to preempt state law in matters covered by the Commerce Clause. A State prevented from adopting its preferred policy by such preemptive federal legislation may be *frustrated*, but it is not *commandeered*. And that does not change when the State tries to evade federal law by adopting the preempted policy through a "partial repeal" rather than a new enactment. At bottom, although petitioners' objection is framed in the language of the Tenth Amendment, it rests on a policy disagreement with PASPA's preemption of state law.

A. The Tenth Amendment Does Not Prevent Congress From Preempting State Laws That Conflict With Federal Statutes

1. Under the Tenth Amendment, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz* v. *United States*, 521 U.S. 898, 925 (1997). That anti-commandeering rule derives from our constitutional structure, which does not "confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York* v. *United States*, 505 U.S. 144, 162 (1992).

This Court has twice found a violation of the anti-commandeering rule, in *New York* and *Printz*. The

statute at issue in *New York* directed States either to take ownership of nuclear waste or to regulate it according to Congress's instructions. 505 U.S. at 153-154. The Court invalidated that provision because Congress lacked authority "to impose either option as a free-standing requirement"—and, in particular, because the second option would have "present[ed] a simple command to state governments to implement legislation enacted by Congress." *Id.* at 175-176. Similarly, the statute at issue in *Printz* "compell[ed] state officers to execute federal laws" by requiring them to conduct background checks. 521 U.S. at 905.

Those statutes were invalid because they sought to conscript the States into enacting or enforcing specific federally prescribed regulations. And because Congress cannot force States to *enact* specific regulations, it also cannot compel them to *maintain* specific regulations that they happen to have enacted already. That, too, would allow Congress to "employ state governments as regulatory agencies." *New York*, 505 U.S. at 163. But if a law "does not require the States in their sovereign capacity to regulate their own citizens" and "does not require state officials to assist in the enforcement of federal statutes," then it is "consistent with the constitutional principles enunciated in *New York* and *Printz*." *Reno* v. *Condon*, 528 U.S. 141, 151 (2000).

2. This Court's decisions distinguish between impermissible commandeering and permissible preemption. Congress may not require the States to enact or maintain specific laws, but it is free to preempt state laws that conflict with federal policy. And if a State amends its law in a manner that is found to be preempted, the State cannot claim that it has been com-

mandeered merely because its statutory scheme reverts to pre-amendment law until its legislature acts again.

"A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981). The constitutionality of such legislation follows directly from the Supremacy Clause, which makes federal law "the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. "Under this principle, Congress has the power to preempt state law," and "[t]here is no doubt that Congress may withdraw specified powers from the States." *Arizona* v. *United States*, 567 U.S. 387, 399 (2012).

Congress exercises that authority in many ways. It may expressly or impliedly prohibit state laws with particular features.[2] It may bar *all* state regulation in specified fields, either to allow exclusive federal regulation or to implement a deregulatory policy.[3] Or it may conditionally preempt state law by "ma[king] compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." *Printz*, 521 U.S. at 926; see, *e.g.*, *Hodel*, 452 U.S. at 288. In all of those forms, preemptive federal statutes "obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important." *Hodel*, 452 U.S. at 290. And when a court finds a state law invalid on preemption grounds, it

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[2] See, *e.g.*, 7 U.S.C. 1639i(b) (food labeling); 12 U.S.C. 4122(a) (mortgages); 21 U.S.C. 360k(a) (medical devices); 21 U.S.C. 387p(a)(2) (tobacco products).

[3] See, *e.g.*, 29 U.S.C. 1144(a) (employee benefit plans); 49 U.S.C. 14501(c)(1) (motor carriers); 49 U.S.C. 41713(b)(1) (air carriers).

necessarily requires the State to tolerate, at least temporarily, a legal regime different from the one originally chosen by the legislature—by, for example, reverting to prior law. As this Court has explained, "the Supremacy Clause permits no other result." *Ibid.*

In that circumstance, there is no conflict between the Supremacy Clause and the Tenth Amendment because preemptive federal legislation does not compel States to enact or maintain federally prescribed regulations. States remain free to adopt any policy that Congress has not placed out of bounds. And if a court invalidates a state law that transgresses those boundaries, the legislature is not stuck with the resulting legal regime—instead, it may choose any policy that is not preempted. This Court was thus careful to note that the anti-commandeering rule does not disturb the fundamental principle that "[t]he Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests." *New York*, 505 U.S. at 188.

B. Section 3702(1) Preempts State Laws That Authorize Sports-Gambling Schemes

Congress enacted PASPA in response to a wave of proposals to use state-sanctioned sports-gambling to address the States' fiscal woes. A few States had already incorporated sports betting into their state lotteries, and "[m]any" others were considering following suit. Senate Report 5. States were also contemplating proposals to authorize and tax private schemes, such as "bets on sports at off-track betting parlors" and "casino-style sports books." *Ibid.* Congress feared that "State-sanctioned sports gambling" would promote betting by minors and threaten the integrity of sports, and it determined that "[t]he answer to State budgetary problems

should not be to increase the number of lottery players or sports bettors." *Id.* at 4, 7.

Congress did not adopt comprehensive regulations on sports gambling, which was already subject to various state and federal laws. Senate Report 6-7; see, *e.g.*, 18 U.S.C. 1084, 1301-1308, 1955. Instead, PASPA focuses on the particular issue that prompted congressional action: state-sanctioned schemes. PASPA addresses those schemes through three categories of prohibitions: regulations of the States' own activities, regulations of private conduct, and preemption of specified state laws.

First, Section 3702(1) provides that States may not "sponsor, operate, advertise, [or] promote" sports-gambling schemes. Those prohibitions bar States from incorporating sports betting into their lotteries or otherwise conducting sports gambling themselves. And although those prohibitions directly govern States, the Commerce Clause allows Congress to regulate the States' own activities affecting interstate commerce without violating the Tenth Amendment. See *Condon*, 528 U.S. at 151; *South Carolina* v. *Baker*, 485 U.S. 505, 514 (1988). Accordingly, as petitioners do not dispute, Section 3702(1)'s prohibition on state-run sports gambling raises no commandeering issue.

Second, Section 3702(2) makes it unlawful for a private person to "sponsor, operate, advertise, or promote" a sports-gambling scheme "pursuant to the law" of a State. Those prohibitions effectively nullify state laws authorizing private sports-gambling schemes by making the operation of such schemes a violation of federal law. But again, as petitioners do not dispute, that prohibition is entirely consistent with the Tenth Amendment. The anti-commandeering rule does not "shield[] the States

from pre-emptive federal regulation of *private* activities affecting interstate commerce." *Hodel*, 452 U.S. at 291.

Third, Section 3702(1) provides that it is unlawful for a State or other governmental entity to "license, or authorize by law or compact," sports-gambling schemes. Those prohibitions enforce the same federal policy as Section 3702(2) by expressly preempting state laws that license or authorize private sports-gambling schemes.[4] Preempting those laws undoubtedly prevents some States from adopting their favored policies—indeed, that was the point. But Section 3702(1)'s preemption of state laws that conflict with federal policy is not impermissible commandeering because it does not compel the States to enact, maintain, or enforce federally prescribed regulations. "PASPA does not *require* or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law." Pet. App. 25a (citation omitted). Instead, a State need only refrain from licensing or authorizing by law sports-gambling schemes.

C. Section 3702(1) Does Not Compel States To Enact Or Maintain Prohibitions On Sports Gambling

Petitioners' principal Tenth Amendment challenge to Section 3702(1) is that it is not a preemption provision at

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[4] Section 3702(1) differs from the typical formulation of preemption provisions by specifying that "[i]t shall be unlawful" for a State to license or authorize sports-gambling schemes. 28 U.S.C. 3702(1). But that is equivalent to the common formulation that "no state may" enact specified laws. See, *e.g.*, 7 U.S.C. 1639i(b); 15 U.S.C. 6760(b); 21 U.S.C. 387p(a)(2)(A); 42 U.S.C. 300aa-22(e). This Court "do[es] not require Congress to employ a particular linguistic formulation when preempting state law." *Coventry Health Care of Mo., Inc.* v. *Nevils*, 137 S. Ct. 1190, 1199 (2017).

all. Instead, petitioners insist that Section 3702(1) must be construed as "a direct command to States to prohibit sports betting." NJTHA Br. 34-35; see N.J. Br. 40 (same). A statute imposing that command would indeed violate the Tenth Amendment. But Section 3702(1) is not such a statute. Petitioners' contrary interpretation contradicts both Section 3702(1)'s text and the fundamental canon that statutes should be construed to avoid—not create—constitutional difficulties.

1. Petitioners' argument rests on the premise that a State "authorize[s] by law" sports-gambling schemes whenever it does not prohibit them. Petitioners note that "the word 'authorize' can be defined to reach any circumstance where the legislature 'permits a thing to be done.'" N.J. Br. 42 (brackets and citation omitted); see NJTHA Br. 31. It is true that "the word 'authorize' sometimes means simply 'to permit'" or to fail to prohibit. *County of Washington* v. *Gunther*, 452 U.S. 161, 169 (1981). But it "ordinarily denotes affirmative enabling action." *Ibid.*[5] And several textual and contextual cues confirm that ordinary meaning here.

First, Section 3702(1) speaks not simply of "authoriz[ation]," but of "authoriz[ation] *by law*." 28 U.S.C. 3702(1) (emphasis added). The 2014 Act's selective and conditional permission to engage in conduct that is generally prohibited certainly qualifies, but one would not ordinarily say that private conduct is "authorized by law" simply because the government has not prohibited it. Mere "lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law."

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[5] See, *e.g.*, *Black's Law Dictionary* 133 (6th ed. 1990) ("To empower; to give a right or authority to act."); 1 *Oxford English Dictionary* 798 (2d ed. 1989) ("To give formal approval to; to sanction, approve, countenance.").

NCAA v. *Governor of N.J.*, 730 F.3d 208, 232 (3d Cir. 2013), cert. denied, 134 S. Ct. 2866 (2014).

Second, the phrase "authorize by law" appears in a list with "sponsor, operate, advertise, promote, [and] license," all of which convey affirmative approval or encouragement. Under the familiar principle that words are known by the company they keep, the fact that "several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham* v. *United States*, 511 U.S. 368, 371 (1994).[6]

Third, Section 3702(1) parallels Section 3702(2), which makes it unlawful for private persons to conduct sports-gambling schemes "pursuant to the law" of a State. 28 U.S.C. 3702(2). One would not naturally describe a person conducting a sports-gambling operation that is merely left unregulated as acting "pursuant to" state law.

Finally, Section 3702(1) applies not just to States, but to all "governmental entit[ies]"—a term broadly defined to include any "political subdivision of a State." 28 U.S.C. 3701(2). If Section 3702(1) were "a direct command to States to prohibit sports betting" (NJTHA Br. 34-35), it would impose the same command on *all* covered governmental entities. But petitioners could not plausibly maintain that Congress commanded every county, district, and municipality in the Nation to prohibit sports betting.

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[6] That inference is reinforced by the phrase "authorize by law *or compact*." 28 U.S.C. 3702(1) (emphasis added). The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, permits certain gaming on Indian lands only if it is affirmatively authorized by a "compact" between the tribe and the State. 25 U.S.C. 2710(d)(1)(C) and (3); see 28 U.S.C. 3701(2), 3704(b) (cross-referencing IGRA).

2. If there were any doubt about the most natural reading of Section 3702(1)'s text, it would be eliminated by the "cardinal principle" that a statute must be construed to avoid constitutional problems "unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). If Section 3702(1) compelled States to enact or maintain prohibitions on sports gambling, it would violate the Tenth Amendment. That problem evaporates if the statute is construed to preempt state laws that affirmatively authorize sports-gambling schemes. That by itself provides sufficient reason to reject petitioners' interpretation.

Petitioners do not deny that their reading of Section 3702(1) would create constitutional difficulties. Just the opposite: they invite the Court to adopt that reading *because* it is "obviously unconstitutional" and they wish to see Section 3702(1) struck down. NJTHA Br. 35; see N.J. Br. 40. This Court should decline petitioners' invitation to interpret a statute to manufacture, rather than eliminate, constitutional problems.

3. Petitioners contend (N.J. Br. 44-45; NJTHA Br. 33-34) that PASPA's legislative history compels the conclusion that Congress sought to conscript the States into maintaining prohibitions on sports gambling. Even the most convincing legislative history could not overcome the ordinary meaning of the statutory text or the canon of constitutional avoidance—let alone both. In any event, the legislative record, taken as a whole, reinforces the conclusion that Congress simply sought to prohibit sports-gambling schemes bearing a State's imprimatur.

Petitioners observe (N.J. Br. 43-44; NJTHA Br. 34) that PASPA's supporters sometimes condemned "legalized" sports gambling, *e.g.*, Senate Report 7, or said that PASPA would prevent States from "allowing" it, 138 Cong. Rec. 33,823 (1992) (Sen. Bradley). But those statements must be understood in the context in which they were made. States were actively considering either getting into the sports-betting business themselves or authorizing selected private parties to do so for the States' economic benefit. Senate Report 5. There is no indication that States were considering broader repeals of their existing prohibitions, and no suggestion that Congress was concerned about that possibility. *Ibid.*; see Resp. Br. 28-29, 39-41. Given that context, and particularly given PASPA's text, the references to "legalizing" or "allowing" sports betting should be understood to refer to the proposals under consideration at the time: state-run sports lotteries and state-authorized schemes at selected venues such as "casino[s]" or "off-track betting parlors." Senate Report 5.

D. Section 3702(1) Validly Preempts The 2014 Act

New Jersey wishes to do what PASPA prohibits: to authorize sports gambling at its licensed casinos and racetracks, but nowhere else. It could have implemented that policy by passing a statute expressly authorizing casinos and racetracks to engage in sports gambling, by enacting a new provision granting those facilities an express exemption from its gambling laws, or by "partially repealing" those laws to the extent they apply to sports gambling at casinos and racetracks. Those three formal paths lead to identical substantive results.

Had New Jersey followed either of the first two, there would have been little question that it had "authorize[d]

by law" sports gambling. The new enactment—whether framed as an authorization or an exemption—would have been straightforwardly preempted by PASPA. And New Jersey could not have complained that it was being required to leave in place laws it had chosen to repeal. The preemption of New Jersey's chosen enactment simply would have left state law as it was before. Indeed, that is exactly what happened when New Jersey took a version of the first path in 2012. *Christie I*, 730 F.3d at 226-237.

The analysis is no different now that New Jersey has reached the same substantive policy through a novel formal mechanism crafted "to sidestep federal law." J.A. 128. After all, "the Supremacy Clause cannot be evaded by formalism." *Haywood* v. *Drown*, 556 U.S. 729, 742 (2009). The 2014 Act is preempted by Section 3702(1) because it is, in substance, an "authoriz[ation] by law" of sports gambling. The fact that Section 3702(1) prevents New Jersey from effectuating this particular "partial repeal" is not unconstitutional commandeering, because it imposes no greater constraint on the State's legislative freedom than any preemptive federal statute that prevents a State from adopting its preferred policy. And although Section 3702(1) forecloses New Jersey's favored approach to sports gambling, it leaves the State ample room to select from a variety of policies that are not impermissible authorizations. See pp. 28-30, *infra*.

1. The 2014 Act is preempted by Section 3702(1) because it is an "authorization by law"

The NJTHA contends (Br. 49-57) that the 2014 Act is not preempted by Section 3702(1) because a state law styled as a "partial repeal" can *never* be an "authoriz[ation] by law." Petitioners did not include that statutory argument in their certiorari petitions, and

New Jersey does not advance it now. Petitioners were correct to abandon the argument. As the court of appeals held, the 2014 Act is an authorization by law of sports gambling within the ordinary meaning of Section 3702)(1). A contrary interpretation would eviscerate PASPA.

Ordinarily, to "authorize by law" is to take some "affirmative enabling action," *Gunther*, 452 U.S. at 169, or "to give a right or authority to act," *Black's Law Dictionary* 133 (6th ed. 1990). The mere absence of a legal prohibition does not suffice. See pp. 17-18, *supra*. But New Jersey law as modified by the 2014 Act is not silent on, or indifferent to, sports gambling. The State generally prohibits all such gambling, but provides a narrow, conditional exception tailored to advance the State's economic interests by encouraging sports gambling at a handful of state-licensed casinos and racetracks. 2014 Act § 1; see Pet. App. 12a-13a.

That regime is naturally described as "authoriz[ing] by law" gambling at the favored venues. Suppose, for example, that a State enacted a law providing that "no person may provide teeth-whitening services, except that the foregoing prohibition shall not apply to a licensed dentist who provides such services to adults." One would naturally say that licensed dentists were "authorize[d] by law" to provide teeth-whitening services to adult patients. And that would be equally true if the State had enacted a statute providing that "no person may provide teeth-whitening services" and then "partially repealed" that statute "to the extent it applies to licensed dentists who provide such services to adults." That is essentially what New Jersey has done. Petitioners can scarcely disagree, because the 2014 Act was an exercise of the legislature's authority under the state

constitution to "*authorize by law*" sports gambling at casinos and racetracks. N.J. Const. Art. IV, § 7, Para. 2(D) and (F) (emphasis added).

The NJTHA's contrary interpretation would gut PASPA, because virtually any authorization could be reformulated as a "partial repeal." For example, the 2012 Act placed sports gambling under New Jersey's existing regulatory framework for other gambling. Petitioners conceded that the 2012 Act conflicted with Section 3702(1)—indeed, it was "precisely what PASPA says the states may not do." *Christie I*, 730 F.3d at 227. Yet the 2012 Act could have been reformulated as a statute "partially repealing" prohibitions on sports gambling to the extent they applied to casinos and racetracks that conducted sports gambling in conformity with the regulations governing their other gambling activities. And virtually any other authorization could likewise be reframed as a "partial repeal" conditioned on compliance with sufficiently detailed requirements. States may not evade preemptive federal legislation through such manipulation of state-law labels.

Petitioners imply (N.J. Br. 3, 10-11) that New Jersey adopted the 2014 Act in reliance on statements by the Third Circuit and the United States that PASPA would allow it "to repeal [its sports-gambling] prohibitions in whole or in part." Br. in Opp. 11, *Christie* v. *NCAA*, 134 S. Ct. 2866 (2014) (Nos. 13-967, 13-979, and 13-980); see *Christie I*, 730 F.3d at 233. PASPA does indeed leave States free to modify or repeal their sports-gambling laws in a variety of ways. See pp. 28-29, *infra*. In context, the Third Circuit and the government were referring to such permissible partial repeals—*i.e.*, partial repeals that do not amount to affirmative authoriza-

tions of sports-gambling schemes at a handful of favored venues. Neither the Third Circuit nor the government suggested that PASPA would allow a gambit like the 2014 Act or that federal law could be evaded through state-law labeling. One of the petitioners previously acknowledged as much: When first presented with a "partial repeal" like the 2014 Act, Governor Christie rejected it as a "novel attempt to circumvent the Third Circuit's ruling" and "[i]gnor[e] federal law." J.A. 128.

2. Preemption of a specific partial repeal or other amendment is not commandeering

Petitioners contend (N.J. Br. 36-40; NJTHA Br. 47) that if Section 3702(1) prevents New Jersey from adopting the "partial repeal" in the 2014 Act, it is necessarily commandeering because it compels the State to maintain laws it has repealed. That argument rests on a misunderstanding of the anti-commandeering rule.

a. Congress does not offend the Tenth Amendment when it "curtail[s] or prohibit[s] the States' prerogatives" through preemptive legislation. *Hodel*, 452 U.S. at 290. That remains true whether the State arrives at the preempted policy by legislating "up" (adding to existing law) or "down" (repealing existing law). The Tenth Amendment inquiry turns on the substantive interaction between state and federal law—not the state law's label or the process by which it was adopted.

Preemptive federal legislation thus routinely bars some amendments to state law, including "partial repeals." For example, Congress has prohibited States from imposing an electricity tax that "discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers." 15 U.S.C. 391. A State could not evade that prohibition by first providing a

nondiscriminatory tax credit and then, sometime later, partially repealing that credit to the extent it applied to out-of-state entities.[7] Similarly, if a federal statute prohibited States from penalizing companies for doing business in a particular country, a State could not partially repeal a tax exemption (or other benefit) to the extent it applied to companies doing business there. Cf. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 366-374 (2000). Such preemption of particular repeals of existing state statutes "follows directly from the Constitution's instruction that a state law may not be enforced if it conflicts with federal law." *Riley* v. *Kennedy*, 553 U.S. 406, 427 (2008).[8]

b. Petitioners err in asserting (N.J. Br. 3-4) that Section 3702(1)'s preemption of the 2014 Act must be a commandeering violation because it "compels New Jersey officials to maintain in force, as state law, prohibitions against sports wagering that, as far as the New

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[7] Equivalent examples could be constructed based on many other statutes preempting state laws differentiating between specified classes of entities. See, *e.g.*, 12 U.S.C. 25b(b)(1); 15 U.S.C. 6733(b); 31 U.S.C. 313(f)(1); 47 U.S.C. 332(c)(3)(A).

[8] The Court made that observation in the context of Section 5 of the Voting Rights Act of 1965, 52 U.S.C. 10304 (Supp. III 2015), which "routine[ly]" required a State to "administer a law it ha[d] repealed" because the repealing legislation had been denied preclearance. *Riley*, 553 U.S. at 427. Section 5's preclearance requirement is an extraordinary measure, enacted pursuant to Congress's power to enforce the Fourteenth and Fifteenth Amendments, that subjects state law to prior federal approval. See *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2618 (2013). But once the federal government has withheld such approval, the preemption of a particular repeal of state law does not depend on the extraordinary nature of Section 5. Rather, as the Court observed in *Riley*, it "follows directly" from the Supremacy Clause. 553 U.S. at 427.

Jersey Revised Statutes are concerned, no longer exist." The Tenth Amendment bars Congress from "commandeer[ing] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 161 (brackets and citation omitted). That sort of commandeering occurs when Congress directs States to enact (or maintain) a particular "regulatory program." *Ibid.* But it is different when, as here, preemptive federal legislation simply prevents a State from giving effect to some "specific partial repeal" or other amendment. Pet. App. 24a. In that circumstance, state law may revert to its pre-amendment condition until the legislature can act again. But the legislature is not conscripted into leaving any particular law on the books—it is free immediately to amend its laws again. The State is simply disabled from adopting the prohibited policy, whether it does so through a new enactment or a partial repeal.

The point would be obvious if, instead of styling the 2014 Act as a "partial repeal," New Jersey had enacted a new statutory provision specifying that the sports-gambling schemes at issue "are authorized" or "shall be exempt" from all state gambling laws. Both provisions would be preempted by PASPA, and both could be excised without reviving statutory provisions that "no longer exist." N.J. Br. 4. To allow New Jersey to avoid preemption by adopting the same substantive policy through a different formal mechanism would provide a roadmap for flouting the Supremacy Clause.

c. Petitioners assert (N.J. Br. 29-30; NJTHA Br. 38-39) that Section 3702(1) should be deemed a commandeering violation because it raises political accountability concerns like those described in *New York*.

There, the Court observed that when "the Federal Government directs the States to regulate," state officials may "bear the brunt of public disapproval" even though it was "federal officials who devised the regulatory program." 505 U.S. at 169. But that concern arises only when state officials "cannot regulate in accordance with the views of the local electorate *in matters not preempted by federal regulation*." *Ibid.* (emphasis added). When Congress preempts state law, it acts "in full view of the public," and it is thus Congress that will "suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* at 168. Here, petitioners do not suggest that there is any confusion among New Jersey voters about which sovereign is responsible for the State's inability to authorize sports betting at Atlantic City casinos.

d. Petitioners also assert (N.J. Br. 36-37) that the district court's injunction itself constitutes a commandeering violation. The court enjoined state officials from "giving operation or effect to the 2014 Law." Pet. App. 113a. That injunction does not compel the officials to take specific acts or to bring particular enforcement actions. Cf. NJTHA Br. 37. It merely requires them to respect the court's determination that the 2014 Act is preempted. That instruction reflects the uncontroversial principle that preempted laws "are *ipso facto* invalid" and that "*all* state officials" have a duty "to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law." *Printz*, 521 U.S. at 913. An injunction requiring compliance with that duty poses no independent commandeering concern because "the power of federal courts to enforce

federal law * * * presupposes some authority to order state officials to comply." *New York*, 505 U.S. at 179.[9]

3. Section 3702(1) does not put States to a binary choice between maintaining total prohibitions on sports gambling or repealing their sports-gambling laws entirely

Finally, petitioners assert that if Section 3702(1) preempts the partial repeal in the 2014 Act, it leaves the States "a binary choice of repealing *all* or *none* of its prohibitions on sports gambling." NJTHA Br. 43-44; see N.J. Br. 45-48. Petitioners further contend that, by putting the States to that choice, Congress impermissibly sought to coerce them to maintain total prohibitions on sports betting. Petitioners are wrong on both counts.

a. Section 3702(1) preempts only state laws that "license, or authorize by law or compact," sports-gambling schemes. That provision leaves States free to adopt a variety of regulatory approaches to sports gambling between a complete prohibition and total deregulation. Most obviously, PASPA is directed only at "lotter[ies], sweepstakes, or other betting, gambling, or wagering scheme[s]." 28 U.S.C. 3702. Because the statute addresses only those organized "scheme[s]," it does not reach casual, informal activities such as social wagers among families and friends. Changes to state laws regulating such activities do not implicate PASPA at all—and, indeed, some States do not prohibit social sports wagering. See, *e.g.*, Colo. Rev. Stat. § 18-10-102(2)(d) (2016); Haw. Rev. Stat. § 712-1231(a) (2016).

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[9] Even if the injunction raised concerns, the solution would be to limit respondents to declaratory relief, not to invalidate Section 3702(1). See 28 U.S.C. 2201(a).

In addition, PASPA addresses schemes, not their customers. Section 3702's prohibitions reach those who "sponsor, operate, advertise, or promote" a scheme. That supply-side focus is confirmed by the absence of penalties or enforcement mechanisms other than injunctive relief. 28 U.S.C. 3703. Accordingly, PASPA does not prevent a State from repealing or modifying its criminal and civil laws applicable to those who wager in—but do not operate—sports-gambling schemes.

More broadly, while a State may not confer a special right to conduct sports-gambling schemes on a handful of state-licensed entities, PASPA would not prohibit a range of deregulatory measures that would not constitute "licens[ing]" or "authoriz[ation] by law." For example, one would not naturally say that a State had "authorize[d] by law" sports-gambling schemes if it eliminated prohibitions on sports gambling involving wagers by adults or wagers below a certain dollar threshold. A person who engaged in those activities would not readily be described as acting "pursuant to" state law. 28 U.S.C. 3702(2). And if a State had originally chosen not to regulate sports gambling at all, its later enactment of laws barring betting by minors or wagers above a certain threshold would not readily be regarded as "authoriz[ing] by law" the sports gambling left unprohibited. The result should be the same if a State adopts an identical regime by repealing existing prohibitions.

b. Petitioners misconceive PASPA in attempting to analogize it to conditional-spending provisions or conditional-preemption provisions like the one in *Hodel*, 452 U.S. at 288. Such provisions seek "to encourage a State to regulate in a particular way," and they thus include express conditions and standards for the regulation that Congress is trying to encourage the State to

adopt. *New York*, 505 U.S. at 166; see *id.* at 167-168. PASPA is not such a statute. It is traditional preemptive legislation that places certain policies—*i.e.*, state-licensed and state-authorized sports-gambling schemes—unconditionally out of bounds. It does not address States' broader policies toward sports gambling, much less seek to coerce States into leaving their existing policies in place.

Petitioners assert that it would be "bizarre" for Congress to have barred States from authorizing regulated sports gambling at casinos, but done nothing to stop the States from repealing their existing prohibitions altogether or adopting policies that would result in more sports betting rather than less. N.J. Br. 44; NJTHA Br. 46, 55. There is no anomaly. When it enacted PASPA, Congress likely assumed that States would largely maintain their longstanding general prohibitions on sports gambling, because there was no indication that States were considering broad repeals. See Resp. Br. 28-29, 39-41. But PASPA is not—and was not intended to be—a mechanism to coerce States to do so. Instead, it is a narrow provision focused on the specific proposals that led Congress to act: state-run sports gambling and state-sanctioned schemes at casinos and similar venues.

* * * * *

In the end, petitioners' commandeering argument reduces to the assertion (N.J. Br. 4) that Section 3702(1) is unconstitutional because it leaves New Jersey no "realistic means to repeal state-law prohibitions on sports wagering applicable at casinos and racetracks" while preserving those prohibitions in all other contexts. But the fact that preemptive federal legislation bars a

State's preferred policy does not amount to impermissible commandeering. If it did, there would be little left of the Supremacy Clause.

II. PASPA'S REMAINING PROVISIONS ARE SEVERABLE FROM SECTION 3702(1)'S PROHIBITION ON STATE LAWS AUTHORIZING SPORTS-GAMBLING SCHEMES AND INDEPENDENTLY PREEMPT THE 2014 ACT

Petitioners do not challenge the constitutionality of any portion of PASPA other than its prohibition on state laws authorizing sports-gambling schemes. New Jersey nonetheless asserts (Br. 53) that if that single prohibition is invalidated, PASPA must be "struck down in its entirety." That remarkable assertion inverts this Court's approach to severability, which seeks to preserve rather than destroy the legislature's handiwork. There is no basis for invalidating PASPA's other provisions because they would remain fully functional and would continue to serve Congress's objectives. And those remaining provisions also provide an alternative ground for affirmance, because Section 3702(1)'s prohibition on state laws that "license" sports-gambling schemes independently preempts the 2014 Act.

A. PASPA's Remaining Provisions Are Severable

1. "'Generally speaking, when confronting a constitutional flaw in a statute,'" this Court seeks "'to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (citation omitted). So long as the statute remains "fully operative as a law," its other provisions may not be struck down unless it is "evident" that, in light of the Court's constitutional holding, Congress "would have preferred" no law at all to a law with

the unconstitutional provision severed. *Id.* at 509 (citation omitted); see *United States* v. *Booker*, 543 U.S. 200, 246, 265 (2005).

The application of that standard is straightforward here. With the relevant language excised, Section 3702 would provide as follows:

> It shall be unlawful for—
>
> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by ~~law or~~ compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
>
> a [sports-gambling scheme].

28 U.S.C. 3702.

That modified statute would remain "fully operative as a law," because no part of it is dependent on the excised language. *Free Enter. Fund*, 561 U.S. at 509 (citation omitted). It would also function in a manner "consistent with Congress' basic objectives in enacting [PASPA]." *Booker*, 543 U.S. at 259. Indeed, the statute's practical effect would be largely unchanged. Without the excised language, Section 3702(1) would still prohibit States from operating sports-gambling schemes themselves. And although a state law authorizing private sports-gambling schemes would not be expressly preempted by Section 3702(1), Section 3702(2) would prohibit private parties from conducting the schemes the law purported to authorize. Here, for example, even if the 2014 Act were not preempted by Section 3702(1), "[Section] 3702(2) would still plainly render the [2014 Act] inoperative by prohibiting private parties from engaging in gambling schemes pursuant to

that authority." *Christie I*, 730 F.3d at 236 (discussing the 2012 Act).

2. New Jersey's contrary arguments are wholly unpersuasive. First, New Jersey asserts (Br. 56) that Congress would not have wanted to prohibit private parties from conducting sports-gambling pursuant to state law if it could not prohibit States from authorizing them to do so. That is like saying that without suspenders, there is no need for a belt. Congress prevented state-authorized sports gambling by both preempting state authorizations (Section 3702(1)) and prohibiting the underlying private conduct (Section 3702(2)). Without the former, the latter becomes even more important to achieving Congress's obvious objective.

Second, New Jersey contends (Br. 54-55) that if Congress had known it could not bar States from authorizing private sports-gambling schemes, it would not have prohibited States from licensing those schemes to ensure they are "responsibly operated." But Section 3702(2) independently prohibits private parties from operating sports-gambling schemes pursuant to a State's authorization. Congress had good reason to preempt state laws purporting to license the schemes it had independently prohibited private parties from operating.

Finally, New Jersey asserts (Br. 54-55) that Section 3702(1)'s prohibition on state-run schemes is merely "ancillary" to the prohibition on authorizing private schemes. In fact, stopping the spread of state-run schemes like "sports lotteries" was one of Congress's primary goals. Senate Report 8; see *id.* at 5, 7.

B. Section 3702(1)'s Prohibition On State Laws That "License" Sports-Gambling Schemes Independently Preempts The 2014 Act

1. Throughout this litigation, respondents and the government have argued that the 2014 Act impermissibly "license[s]" sports gambling by allowing it only at state-licensed facilities. Gov't Cert. Amicus Br. 17; Gov't C.A. Br. 10-13. The Act plainly does so: it repeals New Jersey's general prohibitions on sports gambling only "to the extent they apply" at casinos and racetracks. 2014 Act § 1. Under New Jersey law, the operators of casinos and racetracks must hold state gambling licenses. N.J. Stat. Ann. §§ 5:5-50 (West 2010), 5:12-96 (West Supp. 2011). The State has thus "license[d]" those facilities to conduct sports-gambling schemes along with their other state-licensed gambling operations. The court of appeals did not reach that argument because it held that the 2014 Act is preempted by Section 3702(1)'s prohibition on "authoriz[ations] by law." Pet. App. 16a n.7. But because it is severable, Section 3702(1)'s independent prohibition on state laws that "license" sports gambling provides a ready alternative ground for affirmance.

2. Petitioners have never identified any sound reason to question that conclusion. First, petitioners have argued (N.J. C.A. Br. 43-44) that, as a formal matter, the licenses held by casinos and racetracks are for other gambling, not sports betting. But when a State issues licenses to engage in particular activities and then allows licensed facilities (and only licensed facilities) to engage in additional, closely related activities, it is simply enlarging the existing licenses.

Second, petitioners have observed (N.J. C.A. Br. 44-45) that state gambling licenses are issued to entities

(casino and racetrack operators), whereas the 2014 Act applies to venues (casino and racetrack sites). But PASPA establishes a general bar on licensing "[sports] betting, gambling, or wagering scheme[s]." 28 U.S.C. 3702. That language does not draw any distinction between licensing entities and licensing venues.

Third, petitioners have asserted that the 2014 Act authorizes sports gambling at two "former racetrack" sites, one of which is now a shopping mall. 2014 Act § 1; see NJTHA Br. 12. But the inclusion of those sites does not alter the analysis. The 2014 Act permits sports gambling at a racetrack if "the operator of the * * * racetrack" consents. 2014 Act § 1. It is far from clear what entity, if any, could qualify as the "operator" of a defunct racetrack that is now a shopping mall. But even if the 2014 Act could be construed to permit sports gambling at such a site, New Jersey still has granted a special right to conduct sports-gambling schemes on a group consisting almost exclusively of entities that hold state licenses to conduct other gambling. That is manifestly a licensing scheme, and New Jersey cannot end-run Section 3702(1) merely by including two previously licensed sites.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 3701 provides:

Definitions

For purposes of this chapter—

(1) the term "amateur sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),

(3) the term "professional sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

2. 28 U.S.C. 3702 provides:

Unlawful sports gambling

It shall be unlawful for—

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

3. 28 U.S.C. 3703 provides:

Injunctions

A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of

the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.

4. 28 U.S.C. 3704 provides:

Applicability

(a) Section 3702 shall not apply to—

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1),

conducted exclusively in casinos located in a municipality, but only to the extent that—

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

(4) parimutuel animal racing or jai-alai games.

(b) Except as provided in subsection (a), section 3702 shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

5. S. 2460, 216th Leg. (N.J. 2014) provides:

AN ACT partially repealing the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events, deleting a portion of P.L.1977, c.110, and repealing sections 1 through 6 of P.L.2011, c.231.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. (New section) The provisions of chapter 37 of Title 2C of the New Jersey Statutes, chapter 40 of Title 2A of the New Jersey Statutes, chapter 5 of Title 5 of the Revised Statutes, and P.L.1977, c.110 (C.5:12-1

et seq.), as amended and supplemented, and any rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such location or to the operation of a wagering pool that accepts such wagers from persons 21 years of age or older situated at such location, provided that the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or operation.

As used in this act, P.L. , c. (C.) (pending before the Legislature as this bill):

"collegiate sport contest or athletic event" shall not include a collegiate sport contest or collegiate athletic event that takes place in New Jersey or a sport contest or athletic event in which any New Jersey college team participates regardless of where the event takes place; and

"running or harness horse racetrack" means the physical facility where a horse race meeting with parimutuel wagering is conducted and includes any former racetrack where such a meeting was conducted within 15 years prior to the effective date of this act, excluding

premises other than those where the racecourse itself was located.

2. (New section) The provisions of this act, P.L. , c. (C.) (pending before the Legislature as this bill), are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event but, rather, are intended and shall be construed to repeal State laws and regulations prohibiting and regulating the placement and acceptance, at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such locations.

3. Section 24 of P.L.1977, c.110 (C.5:12-24) is amended to read as follows:

24. "Gross Revenue"—The total of all sums actually received by a casino licensee from gaming operations, [including operation of a sports pool,] less only the total of all sums actually paid out as winnings to patrons; provided, however, that the cash equivalent value of any merchandise or thing of value included in a jackpot or payout shall not be included in the total of all sums paid out as winnings to patrons for purposes of determining gross revenue. "Gross Revenue" shall not include any amount received by a casino from casino simulcasting pursuant to the "Casino Simulcasting Act," P.L.1992, c.19 (C.5:12-191 et al.). (cf: P.L.2011, c.231, s.7)

4. (New section) The provisions of this act, P.L. , c. (C.) (pending before the Legislature as this bill), shall be deemed to be severable, and if any phrase, clause, sentence, word or provision of this act is declared to be unconstitutional, invalid, preempted or inoperative in whole or in part, or the applicability thereof to any person is held invalid, by a court of competent jurisdiction, the remainder of this act shall not thereby be deemed to be unconstitutional, invalid, preempted or inoperative and, to the extent it is not declared unconstitutional, invalid, preempted or inoperative, shall be effectuated and enforced.

5. Sections 1 through 6 of P.L.2011, c.231 (C.5:12A-1 through C.5:12A-6) are repealed.

6. This act shall take effect immediately.

STATEMENT

This bill implements the decision of the United States Court of Appeals for the Third Circuit in *National Collegiate Athletic Association v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013), wherein the court in interpreting the Professional and Amateur Sports Protection Act of 1992 (PASPA), 28 U.S.C. § 3701 *et seq.*, stated that it does "not read PASPA to prohibit New Jersey from repealing its ban on sports wagering." *National Collegiate Athletic Association*, 730 F.3d at 232. The court further stated that "it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or *what the exact contours of the prohibition will be.*" *Id.* at 233 (emphasis added). Moreover, the United States in its brief submitted to the Supreme Court of the United States in opposition to petitions for writs of certiorari in the above-referenced case wrote that

"PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, *New Jersey is free to repeal those prohibitions in whole or in part.*" United States Brief to the Supreme Court in Opposition to Petitions for Writs of Certiorari (Nos. 13-967, 13-979, 13-980), dated May 14, 2014, at 11 (emphasis added).

RECORD AND BRIEFS

Supreme Court, U.S.
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Nos. 16-476 & 16-477

IN THE

Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Respondents.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN GAMING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The American Gaming Association (AGA) is a non-profit trade association whose members participate in the U.S. commercial and tribal gaming industry, a highly regulated, $240 billion industry that supports 1.7 million jobs and provides $38 billion in tax revenue across 40 States. On behalf of its members, the AGA works with law enforcement, elected officials, regulatory agencies, and tribal leaders to combat illegal gambling and to promote next-generation regulatory regimes.

A significant part of that effort concerns sports betting—the target of the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3701 *et seq.*, at issue in this case. Hoping to "stop the spread of State-sponsored sports gambling," S. Rep. No. 102-248, at 4 (1991), this federal law prohibits all but four States from authorizing or licensing sports betting in any form, and prohibits all States but Nevada and most sovereign tribal governments from allowing traditional, single-game sports betting.

It has failed. Americans continue to bet on sports, but, thanks to PASPA, most of that betting occurs illegally. The AGA estimates that Americans illegally bet over $150 billion *per year* on U.S. sporting events. Earlier this year, Americans bet an estimated $15 billion on the Super Bowl and NCAA Men's Basketball Tournament alone, and 97% of those bets were made

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[1] No counsel for a party authored this brief in whole or in part, and no one other than the AGA, its members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from all parties consenting to the filing of *amicus curiae* briefs in support of either or neither party have been filed with the Clerk of the Court.

illegally. See Am. Sports Betting Coal., *The One Issue that Unites All American Voters: End the Federal Sports Betting Ban*, *available at* https://perma.cc/5JWP-UXW7.

PASPA has thus had the perverse effect of pushing an enormous market underground by way of federal decree while stamping out state and local efforts to adapt their own laws pursuant to their own citizens' wishes. States like New Jersey are compelled, at the federal government's direction, to keep their antiquated sports-betting laws and regulations effectively frozen in place at a federal standard. That result is irreconcilable with the constitutional system of dual sovereignty and dangerous in its own right.

Regulation of sports betting needs to be accomplished in a sensible manner that promotes, rather than thwarts, the strictures and principles of federalism. Because PASPA fails to do so, the AGA submits this brief.

SUMMARY OF ARGUMENT

The Third Circuit erroneously concluded that Congress can ossify state law by enjoining a state legislature from amending or repealing its sports-betting laws. This decision is incompatible with this Court's anti-commandeering jurisprudence and is severely detrimental to State efforts to combat sprawling black markets for illegal sports gambling.

I. The federal government may not "compel the States to require or prohibit" certain acts, *New York* v. *United States*, 505 U.S. 144, 166 (1992), nor "control or influence the manner in which States regulate private parties," *South Carolina* v. *Baker*, 485 U.S 505, 514 (1988), nor "require the States ... to regulate their own citizens," *Reno* v. *Condon*, 528 U.S. 141,

151 (2000). The reason for this principle is that the Constitution "contemplates that a State's government will represent *and remain accountable to* its own citizens." *Printz* v. *United States*, 521 U.S. 898, 920 (1997) (emphasis added). But when the federal government tries to regulate *States*, rather than individuals, democratic accountability is lost. *New York*, 505 U.S. at 169. Congressional attempts to coercively define state law have therefore been consistently struck down as "overstep[ping] the boundary between federal and state authority." *Id.* at 159.

PASPA warrants the same treatment. Rather than directly regulating sports betting, the federal government has prohibited States and tribal governments[2] from changing their laws to "sponsor, operate, advertise, promote, license, or authorize" sports betting. 28 U.S.C. §§ 3702(1), 3704(a). States and tribes thus have no say in the ongoing content of their own laws but are required to do the federal government's bidding—all while Congress "remain insulated from the electoral ramifications." *New York*, 505 U.S. at 169. Congress cannot commandeer the States in this manner and demand that they maintain laws and enforcement mechanisms that their citizens may prefer to abolish. See, *e.g.*, *Printz*, 521 U.S. at 904–05; *New York*, 505 U.S. at 168–69.

Respondents, the government, and the Third Circuit emphasize that PASPA does not require the States to *enact* any affirmative law, but the statute's constitutionality cannot turn on that formality. As

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[2] PASPA's definition of covered "governmental entit[ies]" incorporates Section 4(5) of the Indian Gaming Regulatory Act. 28 U.S.C. § 3701(2). Thus, while this case deals specifically with matters of *state* sovereignty, PASPA also conscripts sovereign tribal governments into service of a failed federal policy.

construed by the Third Circuit, PASPA prevents States from repealing or amending laws that their citizens no longer support. Just as Congress cannot force a State to regulate its own citizens, Congress cannot prohibit a State from deregulating its own citizens. It is commandeering either way.

II. PASPA's constitutional defects are confirmed by the fact that the statute undermines core federalism principles. Federalism is supposed to "allow[] States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times," and to permit "innovation and experimentation." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). But PASPA binds States (and their citizens) to outdated views that are decidedly not "of their own times," and it binds States to a failed federal regime with no room for State-level experimentation.

Far from stopping sports betting, PASPA has just moved it into the shadows, all while Americans' views on the matter have evolved. This is precisely the type of problem for which States should be encouraged to experiment, consistent with their citizens' views, on a better approach to regulation. PASPA forbids them from doing so.

ARGUMENT

PASPA forces States and sovereign tribal governments to regulate their own citizens pursuant to stale and static federal standards, and simultaneously allows Congress to sidestep the accountability consequences that accompany direct regulation. That is unconstitutional and undermines many of the core protections that the federalist system is designed to uphold. Recognizing PASPA for what it is—an unlawful takeover of State sovereignty—would return the

federal-state balance to its proper place, while making room for legitimate and sensible regulation of sports betting.

I. PASPA VIOLATES CORE PRINCIPLES OF FEDERALISM AND THE ANTI-COMMANDEERING DOCTRINE.

A State's ability to decide what its law is (and is not) is a "quintessential attribute of sovereignty" and precisely "what gives the State its sovereign nature." *FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982). As a sovereign, a State "must stand in need of no intermediate legislations" to regulate its own citizens, but rather must "possess all the means, and have a right to resort to all the methods, of executing the powers with which it is intrusted." *The Federalist* No. 16, at 116 (Alexander Hamilton) (Clinton Rossiter ed., 1961). PASPA violates these principles and, in the process, insulates the federal government that enacted it from the political consequences of enforcing it. See *New York*, 505 U.S. at 168–69, 181–82.

A. The Anti-commandeering Doctrine Safeguards Democratic Accountability.

The Framers rejected a "'central government that would act upon and through the States' in favor of 'a system in which the State and Federal Governments would exercise *concurrent* authority *over the people*.'" *Alden* v. *Maine*, 527 U.S. 706, 714 (1999) (emphasis added). The Constitution thus divides power "between the National Government and the States" and, in doing so, "protect[s] the people, from whom all governmental powers are derived." *Bond*, 564 U.S. at 221.

This foundational structure delimits what the federal government can and cannot do when it decides to regulate within the areas of its designated authority.

On the one hand, the federal government has plenty of regulatory options. Because the Framers "opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States," Congress may regulate those individuals directly and may preempt contrary State regulation. *New York*, 505 U.S. at 165, 173–74, 188. Congress can also "hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes." *Id.* at 188.

On the other hand, however, the federal government's regulatory choices must not "overstep[ ] the boundary between federal and state authority." *Id.* at 159. The clearest way to do so is to try to regulate States themselves, rather than the people. See, *e.g.*, *The Federalist* No. 15, at 109 (Alexander Hamilton) (the people are "the only proper objects of government"). The federal government does not, for example, "have a general right to review and veto state enactments before they go into effect." *Shelby Cty.* v. *Holder*, 133 S. Ct. 2612, 2623 (2013). Nor can the federal government "conscript state governments as its agents," or "compel the States to require or prohibit" certain acts or to "govern according to Congress' instructions." *New York*, 505 U.S. at 162, 166, 178; see also, *e.g.*, *Coyle* v. *Smith*, 221 U.S. 559, 574–75 (1911) (Congress may not prohibit State from changing location of its capitol). When the "federal interest is sufficiently strong to cause Congress to legislate, it must do so *directly*." *New York*, 505 U.S. at 178 (emphasis added).

These limits are rooted in democratic accountability. Representative government derives its power from the people, and its proper functioning therefore depends upon the people's ability to hold lawmakers accountable for their decisions. But when "the Feder-

al Government compels States to regulate, the accountability of both state and federal officials is diminished." *Id.* at 168. Direct federal regulation ensures that "federal officials ... suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* Compelling States to carry out federal law, by contrast, means that state officials may "bear the brunt of political disapproval, while federal officials who devised the regulatory program may remain insulated from the electoral ramifications." *Id.* at 169. And it allows Congress to "take credit for 'solving' problems without having to ... pay for the solutions with higher federal taxes [or to] tak[e] the blame for its burdensomeness and for its defects." *Printz*, 521 U.S. at 930.

The anti-commandeering doctrine in particular and federalism principles more broadly thus guarantee that a State's government remains "accountable to its own citizens," *id.* at 920, and that the federal government remains accountable to its own. Any other result would "threaten the political accountability key to our federal system." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 578 (2012) (plurality opinion); see also *id.* at 678 (Scalia, Kennedy, Thomas, & Alito, J.J., dissenting) ("When Congress compels the States to do its bidding, it blurs the lines of political accountability."). The Constitution's system of dual sovereignty simply does not allow the federal government to regulate only halfway by crafting federal standards and then foisting those standards onto the States without undertaking the burdens and costs that come with regulation.

B. PASPA Forces States To Enforce A Failed Federal Standard.

Gaming regulation has traditionally been a matter of state and local concern. Federal policy in this area

is generally limited to supporting or supplementing the States' own laws—"to defer to, and even promote, differing gambling policies in different States." *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 187 (1999). Consistent with that approach, the Illegal Gambling Business Act, for example, authorizes federal prosecution of multi-state illegal gambling conspiracies but prohibits only activities that operate in violation of *state* anti-gambling laws. 18 U.S.C. § 1955(b)(1)(i). There is no freestanding federal definition of illegal gambling. Similarly, the federal Wire Act, 18 U.S.C. § 1084, seeks only to supplement State laws by authorizing prosecution of illegal sports betting activities beyond the reach of any one State.

In 1992, with the passage of PASPA, Congress decided to wade more affirmatively into the regulation of sports betting, but it stopped short of fully embracing the task. Rather than accept the responsibility of directly prohibiting *individuals* alone from engaging in sports betting, PASPA goes further and forbids *States* from "sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authoriz[ing]" sports betting. 28 U.S.C. § 3702(1). As the Third Circuit, Respondents, and the government see it, moreover, that provision precludes both legislation authorizing sports betting *and* any State's attempt to repeal laws that prohibit the practice short of a complete repeal. The practical effect is a federal command to freeze the sovereign States' sports-betting laws in place and to leave the States unable to revisit those laws in the face of changing circumstances or constituent preferences.

That unconstitutionally commandeers the States to regulate their citizens pursuant to federal standards. In no uncertain terms, PASPA tells States what to do

and it controls how they do it. PASPA thus ensures that it is "[a state official] and not some federal official who stands between the [would-be bettor] and [wagering on sports]." *Printz*, 521 U.S. at 930. When the "citizens of New [Jersey] ... d[id] not consider that [prohibiting sports betting] [wa]s in their best interest"—nearly two-thirds of voters supported repealing the sports-betting ban, Pet. App. 4a—the Constitution allowed them to "elect state officials who share their view." *New York*, 505 U.S. at 168. And New Jersey citizens did precisely that, with large majorities in both houses approving bills to authorize and repeal prohibitions of sports betting. Pet. App. 82a, 84a. PASPA, however, has quietly erased all of this from behind the scenes, leaving New Jersey's lawmakers exposed but powerless to do anything about it. That is unconstitutional.

Having eschewed formalism when interpreting PASPA—holding that a repeal is the same thing as an authorization—the Third Circuit nevertheless believed it to be constitutionally critical that PASPA does not compel States to *enact* positive law but instead forbids them from *repealing* an unpopular law. Pet. App. 12a–16a, 23a–25a. But that is like saying shackles are not coercive because they do not require the wearer to move. It makes absolutely no difference that PASPA locks a federal standard into existing law rather than requiring its passage anew: "in either case, the state is being forced to regulate conduct that it prefers to leave unregulated," or to regulate in a different and more sensible manner. *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring).

Nor does it matter that PASPA, as interpreted by the Third Circuit, prohibits only partial repeals of sports-betting laws and leaves States free to deregu-

late sports betting entirely. No reform-minded State would want to permit sports betting in any place in any amount on any event by any person—including minors or those with the ability to affect the outcome of the event. The "choice" between complete prohibition and complete deregulation would thus force States to choose between "two unconstitutionally coercive regulatory techniques," and that is "no choice at all." *New York*, 505 U.S. at 176.

The government and the Third Circuit attempt to salvage PASPA by claiming that it is really just a preemption statute in a different garb. But preemptive statutes make clear that "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* at 168. In other words, whether through preemption or other direct regulation of sports betting, the Constitution requires that Congress either takes responsibility for an area of law or does not. But with PASPA, Congress has tried to have it both ways, propounding a federal standard and then compelling *States* to regulate their citizens accordingly. That violates the Tenth Amendment. *Id.* at 166.

II. PASPA UNDERMINES THE VALUES THAT FEDERALISM IS SUPPOSED TO PROMOTE.

"Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity"; it also "secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221. This Court has regularly reiterated those benefits, including "'innovation and experimentation,' enabl[ing] greater citizen 'involvement in democratic processes,' and

mak[ing] government 'more responsive.'" *Id.*; see also *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). PASPA is antithetical to these values, whereas striking the law down would allow them to flourish.

A. PASPA And The Regulatory Regime It Has Spawned Frustrate Federalism's Core Principles.

In several respects, PASPA has engendered a failed regulatory landscape that erodes federalism's boundaries and protections.

1. Federalism "allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny *of their own times* without having to rely solely upon the political processes that control a remote central power." *Bond*, 564 U.S. at 221 (emphasis added). PASPA, however, binds States and their citizens to outdated views from times past. In 1989, most Americans supported a ban on sports betting, Pew Research Ctr., *Gambling: As the Take Rises, So Does Public Concern* 12–13 (May 23, 2006), *available at* https://perma.cc/4BXU-5TDS, but the opposite is true today. Most Americans (55%) now support repealing the federal prohibition on sports betting, with just 35% opposed, and those percentages are even stronger among sports fans. See Mem. from Greenberg Quinlan Rosner Research to AGA, Legalizing Sports Betting: A Winning Wager 2, 5 (Apr. 24, 2017), *available at* https://perma.cc/4A68-TE33; see also, *e.g.*, Mem. from the Mellman Grp. to the Am. Gaming Ass'n, Executive Summary of Our Recent Super Bowl Polling 2

(Feb. 2, 2016) (66% of Super Bowl viewers favored allowing States to decide whether to permit sports betting, while only 25% opposed such a change), *available at* https://perma.cc/YM5J-XWN4.[3]

These opinion trends have also coincided with dramatic growth in the gaming industry. Since PASPA's enactment, for example, the number of States with commercial casinos has tripled from eight in 1992 to 24 today. Tribal gaming has also surged, from just a handful of States in 1992 to 28 States across the country (and revenues of nearly $30 billion) a quarter-century later. See *Gross Annual Wager*, Int'l Gaming & Wagering Bus. Mag., Aug. 5, 1994.

None of this should be surprising given the dramatic changes in both sports and society over the last 25 years. At the time of PASPA's adoption, the World Wide Web was just three years old, and no one could have imagined the Internet's growth as the channel for commerce—both legal and illegal—that it has become. New sports (*e.g.*, mixed-martial arts) and new leagues (*e.g.*, Major League Soccer and the WNBA) have also appeared, producing additional events on which to bet. And all the while, sports betting has become far more socially acceptable.

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[3] Even the major sports leagues, who were among the leading supporters of PASPA, have started to change their views. *See, e.g.*, Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. Times, Nov. 13, 2014, (NBA Commissioner favoring a regulatory framework that "allows states to authorize betting on professional sports, subject to strict regulatory requirements and technological safeguards"); Am. Sports Betting Coal., *Sports Betting FAQs* [hereinafter *Sports Betting FAQs*] (MLB and NHL Commissioners recognizing that legal sports betting poses less of a concern to professional sports than once thought), *available at* https://perma.cc/8RK7-KX2T.

Rather than allowing States "to respond ... to the initiative of those who seek a voice in shaping the destiny of their own times," *Bond*, 564 U.S. at 221, however, PASPA requires States to ignore those voices. The system of dual sovereignty is supposed to prevent just that sort of stagnation.

2. The "federal structure" also "permits 'innovation and experimentation,'" *id.* (citation omitted), but PASPA binds States to a failed national regime at the expense of more localized innovation and experimentation.

It is easy to see the myriad ways in which PASPA is not working. To begin, the statute has not stopped people from betting on sports; instead, it has just driven bettors to black markets. When PASPA was enacted, the annual market for illegal sports betting was $40 billion. Andrew Beyer, *Betting Bill Hard to Understand*, Wash. Post, Nov. 17, 1991; see also Koleman S. Strumpf, *Illegal Sports Bookmakers* 6 (Univ. of N.C., Feb. 2003) (working paper) (identifying a single New York bookmaker running a $200 million per year illegal gambling operation in the late 1990s). Today, more than 40 million Americans bet on a sporting event each year, Nielsen Sports, *Legal Sports Betting: What It Would Mean for NFL TV Partners & Advertisers* 8 (Sept. 2016), *available at* https://perma.cc/9ATW-HQUT, and their wagers total at least $150 billion, *Sports Betting FAQs*, *supra*; see also, *e.g.*, Steven Titch & Michelle Minton, Competitive Enter. Inst., On Point No. 224, *Time to End the Madness around March Madness* 3 (Mar. 2, 2017) (estimating total market at approximately a half trillion dollars annually), *available at* https://perma.cc/GMT9-XK8L.

Behind these numbers, moreover, there are even bigger problems. Because betting occurs outside law

enforcement's view, for example, match-fixing stays well-hidden. If it is uncovered, it is usually uncovered inadvertently. Take the FBI's discovery that an NBA referee was involved in a point-shaving scheme: it arrived "purely by accident" from wiretaps in an "unrelated organized crime case." Brian Tuohy, *Larceny Games: Sports Gambling, Game Fixing and the FBI* 17 (2013). Another scandal involving players on the University of Michigan basketball team receiving loans and payments from an illegal betting operation was unearthed only as part of an investigation into a car accident involving a player and a recruit. See *Ed Martin, 69, Key Figure in Michigan Basketball Scandal*, N.Y. Times, Feb. 18, 2003; see generally United Nations Office on Drugs & Crime, *Resource Guide on Good Practices in the Investigation of Match-Fixing* 33–34 (2016) (it is "more difficult to investigate allegations of match-fixing where betting is illegal," and law enforcement in countries like China, Russia, and India cannot rely on "crucial" cooperation), *available at* https://perma.cc/4SUU-R69X.

Not only does illegal gambling mask sports-related scandals, but it also enables and funds other illicit activity. Illegal sports gambling operations are ordinarily large enterprises that use gambling proceeds to fund serious crimes like money laundering, racketeering, human and drug trafficking, and extortion. Jay S. Albanese, *Illegal Gambling & Organized Crime: An Analysis of Federal Convictions in 2014*, at 4–5 (2015), *available at* https://perma.cc/V6RC-UE8S. The FBI sees "the ties of organized crime to illegal sports betting ... every day." Am. Gaming Ass'n Illegal Gambling Advisory Bd., *Law Enforcement Summit on Illegal Sports Betting: After-Action Report* 9 (2015) [hereinafter "*Law Enforcement Summit*"], *available at* https://perma.cc/S8YW-2N68. And there

has been a correlation between PASPA's enactment and an "increase in the involvement of organized crime on sports wagering." Nat'l Gambling Impact Study Comm'n, *Final Report* 2-14 to -15 (1999). Indeed, earlier this year, the leader of "ODOG Enterprise" pleaded guilty to overseeing a criminal conspiracy that involved "vast illegal gambling operation focused on high-stakes wagers placed on sporting events" along with drug trafficking and money laundering. Press Release, U.S. Dep't of Justice, Ring Leader of Violent Drug Trafficking and Illegal Gambling Enterprise Pleads Guilty to Racketeering (Jan. 10, 2017), *available at* https://perma.cc/VA8C-7M23.

In the face of such issues, and with no direct federal regulation in place, States should be able to pursue state-specific "innovation and experimentation." *Bond*, 564 U.S. at 221. New Jersey of course tried to do so, with a primary sponsor of the efforts observing that current laws "give organized crime ... a virtual monopoly on sports wagering." Raymond J. Lesniak, *If You Outlaw Sports Betting, Only Outlaws Will Have Profits*, U.S. News & World Report (June 15, 2012). Other States have expressed similar inclinations to experiment with new regulatory regimes. In 2017, for instance, legislators in 14 states have already introduced 27 pieces of legislation relating to sports betting. See, *e.g.*, H.B. 6948 (Conn. 2017) (signed into law Jul. 10, 2017) (allowing the Commissioner of Consumer Protection to adopt regulations to regulate wagering on sporting events to the extent permitted by state and federal law). And local officials are speaking out to say that "sports betting is something for the people of each state to decide, not the federal government," and that state legislatures should be allowed to authorize sports gambling by statute or to prohibit it. Press Release, Am. Gaming

Ass'n, Diverse Coalition Launches to Repeal Failed Federal Sports Betting Ban (June 12, 2017) (statement of Mick Cornett, Mayor of Oklahoma City and President of the U.S. Conference of Mayors), *available at* https://perma.cc/8KAT-ZE9S; Nat'l Conference of State Legislatures, *Adopted Policy Directive and Resolutions* 27 (2016), *available at* https://perma.cc/954Y-GYFC.

PASPA co-opts all of these efforts to remodel sports-betting laws. That is repugnant to the values our federalist system is supposed to encourage and only confirms PASPA's incompatibility with that system.

B. Invalidating PASPA Would Further The Federalism Benefits That This Court Has Consistently Respected.

The anti-commandeering doctrine protects democratic accountability, ensuring that citizens know who is responsible for what and that federal lawmakers stand behind the standards they enact. *Infra* at § I.A. That focus on accountability and knowledge goes hand-in-hand with the far better approach to sports-betting—namely, that it be regulated sensibly and openly rather than through a half-baked federal law that incentivizes illegality. While PASPA undermines federalism's values, finding it unconstitutional would do the opposite.

1. On the government side, there are ample benefits to *proper* regulation of sports-betting. For starters, people will generally choose a legal, regulated market over the black market that PASPA has fostered. See David Forrest & Rick Parry, *The Key to Sports Integrity in the United States: Legalized, Regulated Sports Betting* 15 (Sept. 27, 2016), *available at* https://perma.cc/RYE3-F5MG. ("[S]o long as the legal sector supplies an attractive product, most recreational bet-

tors are likely to take their money there.") (emphasis omitted). Where sports betting is legal—in places like Nevada, the United Kingdom, or Australia—there is simply is "no demand for a black market." *Law Enforcement Summit* at 5. But where sports betting is outlawed, "[g]ambling thrives unregulated ..., and corruption ... flourishe[s]." Stephen F. Ross et al., *Reform of Sports Gambling in the United States: Lessons from Down Under* 2–3, Penn State Inst. for Sports Law, Policy & Research (2015) (white paper), *available at* https://perma.cc/F9X8-96N6.

The influx of known market participants, moreover, helps government and law enforcement to police crime better. Legal gaming operators can act as "early warning system[s]" of "irregularities," and aggregate data from sportsbooks alerts regulators to potential corruption. *Law Enforcement Summit*, *supra*, at 6. After all, it was the bookmakers who noticed "a sudden and unusually large amount of cash was bet on the underdog" that ultimately brought the infamous Black Sox scandal to light. Alan Solomon, *The Black Sox*, Chi. Trib., Oct. 1, 2008. Governments can also deploy consumer protection measures and other laws to protect people like minors and problem gamblers or even bookmakers. See Forrest & Parry, *supra*, at 11–13 (describing consumer protection laws implemented in regulated sports-betting markets). Surely, that is preferable to a system in which governments stumble upon problems by accident and vulnerable citizens are left unprotected. See *infra* § II.A.

Finally, properly regulated sports betting allows governments to generate substantial revenues to benefit their constituents. A legal sports-betting industry could generate up to $26.6 billion in total economic impact every year though GDP increases, taxes

dollars, and over 150,000 well-paying American jobs. See Oxford Economics, *Economic Impact of Legalized Sports Betting* 5 tbl.ES-1 (May 2017), *available at* http://perma.cc/QH9C-WVS9. More than that, legalized sports betting would create secondary markets for things like data analytics, as has already occurred in other segments of the U.S. gaming industry. See Titch & Minton, *supra*, at 10. Governments should be able to capitalize on these benefits by, for example, directing new revenues to law enforcement, social services, and other matters of vital citizen interest.

2. The private sector, including the AGA's members, likewise has much to offer in a properly regulated sports-betting market. That is because, in a competitive market, bookmakers have a "financial incentive ... in protecting the sport ..., work[ing] with authorities[,] and protect[ing] vulnerable consumers." *Id.* at 5–7. That benefits everyone.

There are numerous examples of how this happens when state and private actors are free from a blanket prohibition. In Nevada, for example, sportsbook operators, data companies, and the sports leagues constantly share data amongst themselves to monitor trends in betting activity. When someone identifies a potential integrity concern or potential regulatory or statutory violation, they alert the Nevada Gaming Control Board (NGCB). The NGCB has both criminal and civil enforcement powers and can then either work with prosecutors to address criminal violations, impose regulatory sanctions, or alert the leagues to potential integrity concerns.

There is similar evidence from Europe. Leading betting operators in the European Union, for instance, have founded the European Sports Security Association (ESSA) to monitor unusual betting patterns and act as an "early warning system" to alert

sports leagues to suspicious or irregular betting patterns. European Sports Sec. Ass'n, *About ESSA*, http://www.eu-ssa.org/about-essa/ (last visited Aug. 30, 2017). ESSA publishes quarterly reports on the numbers of alerts reported and issues guidelines for both betting operators and athletes. See, *e.g.*, ESSA, *ESSA Q2 2017 Integrity Report* (2017), *available at* https://perma.cc/9AV2-476F.

Sports leagues have also have embraced data's ability to guard against corruption. Soccer's international governing federation (FIFA) recently entered an agreement with another company to "identify and analyse any suspicious betting behaviour or patterns" and alert FIFA to possible corruption. See Press Release, FIFA, FIFA Strengthens Global Football Integrity Programme with Sportradar Agreement (Feb. 3, 2017). The Tennis Integrity Unit (TIU) similarly leverages data to identify suspicious behavior and is empowered to fine, suspend, or even ban professional tennis players from competition. See, *e.g.*, Des Bieler, *Possible Wimbledon Match-Fixing Under Investigation by Tennis Anti-Corruption Body*, Wash. Post, July 19, 2017; see also TIU, *Tennis Integrity Unit Briefing Note* (July 19, 2017) (TIU relies on data provided by "betting regulators and gambling organisations" to identify possible cheating), *available at* https://perma.cc/J7GK-VXD2.

All of this makes clear that PASPA's demise will not produce an unregulated betting market in which anyone can bet on any sport in any place and for any amount. Rather, it will produce a gaming industry just like the ones that exist where Congress has not forced States' hands, with operators and regulators working together under a regulatory regime that citizens actually want. From State to State, it will "permit[] 'innovation and experimentation,' enable[]

greater citizen 'involvement in democratic processes,' and make[ ] government 'more responsive.'" *Bond*, 564 U.S. at 221. *That*—not PASPA—is what the system of dual sovereignty that the Framers adopted is supposed to look like.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Third Circuit.

Respectfully submitted,

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Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, ET AL.,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,

Respondents.

On Writ Of Certiorari to the United States Court Of Appeals for the Third Circuit

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici comprise legal scholars at major American law schools who have studied, taught courses about, and/or published scholarship on federalism and other legal doctrines implicated in this case. Each of them has an interest in the faithful interpretation and application of the Tenth Amendment's anti-commandeering principle.

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SUMMARY OF ARGUMENT

I. Congress may not, consistent with the anti-commandeering rule, prevent states from repealing state-law prohibitions on private conduct.

It is well understood that Congress lacks power to compel a state to "enact or administer" a prohibition on activity. *New York* v. *United States*, 505 U.S. 144, 177-79 (1992). By parity of reasoning, Congress likewise cannot prevent states from *repealing* state-law prohibitions on activity. Were it otherwise, Congress could force states to maintain laws that Congress could not have compelled the states to pass in the first place.

To the extent a state "authorizes" (*i.e.*, allows) private conduct to occur simply by repealing state laws forbidding it, such authorization equally cannot be preempted by Congress.

II. PASPA is unconstitutional because it prevents states from repealing state-law restrictions on sports gambling.

The court below wielded PASPA to strike down a 2014 New Jersey law repealing in part state-law restrictions on sports gambling. This flies in the face of the anti-commandeering doctrine. New Jersey's 2014 law simply repealed existing state laws. The

state has done nothing to facilitate or otherwise interfere in the conduct of sports gambling; it simply wishes to let the conduct alone at casinos and racetracks. Congress's admonition that New Jersey *must* proscribe all sports gambling, despite New Jersey's political and policy imperatives to the contrary, runs roughshod on our notion of federalism.

III. The effects of Congress's unprecedented intrusion on state sovereignty will have reverberations far outside the Garden State.

New Jersey is not unique in its decision to take a softer approach toward conduct that is barred under federal law. For example, virtually every state in the Union has repealed portions of its drug prohibitions to permit the possession of marijuana for medicinal or recreational use, even though federal drug laws continue to ban this conduct outright. The lower court's holding that state-law repeals are preemptible could render these experiments invalid and compel states to proscribe all manner of conduct, as a matter of *state* law, that the states would prefer to let alone.

ARGUMENT

I. CONGRESS LACKS THE POWER TO PREVENT STATES FROM REPEALING STATE-LAW PROHIBITIONS ON ACTIVITY

A. The Anti-Commandeering Rule Entitles States to Repeal State-Law Prohibitions on Private Activity

The anti-commandeering rule bars Congress from conscripting the regulatory apparatus of the states. Pursuant to the rule, Congress may not "issue directives requiring the States to address particular problems." *Printz* v. *United States*, 521 U.S. 898, 935

(1997); see *New York* v. *United States*, 505 U.S. 144, 177–79 (1992). Put another way, states may leave activity alone if they choose, even if that activity is prohibited under federal law.

It is axiomatic that, consistent with the anti-commandeering rule, Congress may not order a state to "enact or administer" a prohibition against some activity. *New York*, 505 U.S. at 188. But, as a logical corollary, Congress likewise may not preempt a state's *repeal* of a previously adopted prohibition the state no longer wished to keep. "[P]reventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring); see Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1446 (2009) ("[W]hen state law simply permits private conduct to occur *** preemption of such a law would be tantamount to commandeering."). To avoid arbitrary results in the application of the anti-commandeering rule, states must be free to repeal prohibitions that Congress could not have compelled them to enact in the first place.

Properly understood, the Supremacy Clause empowers Congress to preempt only state action that *interferes* with activity—not state action that lets activity alone. That distinction is consistent with this Court's preemption jurisprudence. The Court has held state laws preempted when those laws have interfered with private conduct—*i.e.*, broadly speaking, made the conduct more (or less) costly. See Mikos,

On the Limits, at 1449 ("[T]he Court has found myriad state laws preempted, but only when the states have punished or subsidized (broadly defined) behavior Congress sought to foster or deter. . ."). [2] By contrast, "the Court has never held that Congress could block states from merely allowing some private behavior to occur, even if that behavior is forbidden by Congress." See *ibid.*

In short, a state is constitutionally entitled to repeal its own prohibitions on individual activity regardless how Congress might choose to regulate that activity under federal law. Congressional legislation that purports to block the repeal of state-law proscriptions constitutes impermissible commandeering.

B. The Anti-Commandeering Rule Likewise Entitles States To "Authorize" Activity By Repealing State-Law Prohibitions

Because Congress cannot prevent the repeal of a state-law prohibition, it likewise cannot prevent a state from "authorizing" activity when such authorization takes the form of a state-law repeal. When a state "authorizes" private activity merely by removing state-law impediments to it, the state is doing no more than *allowing* that activity to occur. Congress can no more forbid states to allow conduct than it

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[2] *E.g.*, *Arizona* v. *United States*, 567 U.S. 387 (2012) (state law barring undocumented immigrants from seeking work); *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861 (2000) (state tort suit claiming manufacturer had a duty to install airbags); *Ableman* v. *Booth*, 62 U.S. 506 (1858) (state court writ demanding release of prisoner being held under the federal Fugitive Slave Act).

could compel states to disallow that conduct in the first place.

Although "authorization" necessarily means allowing some activity to occur, the term is sometimes used more broadly to include state actions that go beyond mere grants of permission. If a state "authorizes" conduct by affirmatively *interfering* in that conduct, then its actions would be vulnerable to preemption. To clarify, imagine a state law that does two separate things: it repeals the state's prohibition on the possession of marijuana, and it also bars landlords from discriminating against tenants on the basis of their marijuana use. Both provisions might be understood to "authorize" marijuana possession in some sense, but only the latter provision could be preempted, because only the latter provision interferes with activity. By imposing a legal duty on landlords to accommodate marijuana use and removing the threat of eviction, the latter provision reduces the costs of marijuana use.[3]

One might argue that even a limited authorization-by-way-of-repeal "interferes" in private activity insomuch as it could increase the frequency of that activity. For example, the repeal of state-law prohi-

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[3] The court below had no need to discuss the relationship between "authorizing" and "licensing" sports gambling, but the two are closely related. Just like authorization, licensure merely provides the state's permission to engage in activity. If that is all licensing does, then it is not pre-emptible, for the same reasons authorization *qua* repeal is not pre-emptible. But if the license imposes *additional* restrictions that interfere with activity—such as requiring a retail licensee to collect sales taxes—those additional restrictions likely would be subject to preemption, even if the underlying license (permission) is not.

bitions on marijuana use could "incidentally change people's beliefs about marijuana use" by suggesting that marijuana is not harmful, in turn making it more likely that individuals will experiment with the drug. Mikos, *On the Limits*, at 1454.

Nonetheless, Congress cannot preempt state authorization qua repeal on the basis of such expressive effects alone:

> Allowing Congress to preempt state laws merely on the basis of their perceived expressive content and related impact on behavior would eviscerate the anti-commandeering limits on Congress's preemption authority: every state law conceivably has some expressive content and some impact on behavior. It also raises nettlesome First Amendment concerns. **** [T]o the extent that state laws perform a purely expressive function, they arguably constitute protected speech and hence may not be preemptable.

Id. at 1455; see also Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 Brooklyn L. Rev. 1295-1301 (2004).

In sum, Congress may not, consistent with anti-commandeering principles (and potentially the First Amendment), prevent states from merely allowing—"authorizing"—private conduct to occur for purposes of state law. State-law repeals of state-law prohibitions are, quite simply, not matters that require Congress's approval.

II. PASPA IS AN UNCONSTITUTIONAL ATTEMPT TO PREVENT STATES FROM REPEALING STATE-LAW PROHIBITIONS ON SPORTS GAMBLING

Under the foregoing principles, the Professional and Amateur Sports Protection Act ("PASPA") is unconstitutional. PASPA makes it unlawful, *inter alia*, for states to "sponsor, operate, advertise, promote, license, or *authorize* by law" sports gambling. 28 U.S.C. § 3702(1) (emphasis added).[4] This provision, as interpreted by the court below, prevents states from simply repealing state-law prohibitions on sports gambling. This is a clear violation of the anti-commandeering rule.

a. New Jersey long ago enacted various statutes that prohibit sports gambling for purposes of state law. Among other things, those statutes make bookmaking a state crime, punishable by hefty fines (up to $35,000) and lengthy prison terms. N.J. Stat. Ann. § 2C:37-2(b). The statutes also make wagers on sporting events unenforceable. *Id.* at § 2A:40-1.

In 2014, however, the New Jersey state legislature sought to repeal those prohibitions, at least as applied to sports gambling activities at casinos and

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[4] For ease of exposition, this brief uses the term "sports gambling" to refer to all of the gambling activities regulated by PASPA. See 28 U.S.C. § 3702(2) (prohibiting a "lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games").

racetracks. 2014 N.J. Session Law Serv. Ch. 62, codified at N.J. Stat. Ann. §§ 5:12A-7 to -9 ("2014 Law"). In relevant part, the 2014 Law declares that the prohibitions cited above, among others,

> are repealed to the extent they apply *** at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such location or to the operation of a wagering pool that accepts such wagers from persons 21 years of age or older situated at such location, provided that the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or operation.

Id. at § 5:12A-7(1).

The court below held that the 2014 Law "authorized" sports gambling, in violation of PASPA, by "selectively grant[ing] permission to certain entities to engage in sports gambling." *Nat'l Collegiate Athletic Ass'n* v. *Governor of N.J* ("*Christie II*")., 832 F.3d 389, 397 (3d Cir. 2016) (*en banc*); see also *id.* at 401 ("[A] state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization' under PASPA."). It therefore affirmed a permanent injunction barring state officials from giving effect to the 2014 Law.

b. So construed, PASPA is unconstitutional. The 2014 Law merely repealed certain of New Jersey's prohibitions on sports gambling—nothing more. Whether the law did so "selectively" or not is irrelevant for purposes of assessing Congress's power to preempt it. The sundry other terms the court used to describe the effects of the 2014 Law—"specific permission," "empowerment," and "permissive[] channel[ing]" of sports gambling, *Christie II*, 832 F.3d at 396, 401—simply restate the conclusion that New Jersey has chosen to allow certain conduct to occur as a matter of state law. The 2014 Law does nothing to "interfere" in sports gambling in the manner discussed above—*i.e.*, in a constitutionally relevant sense. Because PASPA purports to block New Jersey's bare repeal of a state-law prohibition, it flouts the anti-commandeering rule. Indeed, New Jersey has quite literally been commandeered in this case: the lower court's ruling commands that New Jersey re-instate its prohibition on sports gambling in casinos and racetracks.

To illustrate the functional equivalence of the many ways a state can effectively repeal a prohibition on activity, consider the following hypothetical. Suppose that long ago a state adopted the Minimum Drinking Age Act (MDAA), which declares that "It is unlawful for anyone under the age of 21 to possess alcohol." Now suppose that the state has recently had a change of heart and wants to lower its minimum drinking age to 18. It could accomplish this end in any number of ways, including by adopting one of the following laws:

> (A) "MDAA is hereby repealed as applied to anyone 18 years of age or older."

> (B) "Anyone 18 years of age or older is hereby authorized to possess alcohol."
>
> (C) "Prohibiting possession of alcohol by college age students is costly, ineffective, and counter-productive. The language of MDAA is therefore amended to substitute '18' for '21'."

Each of these laws accomplishes the same permissible end: each provides that the state will not punish anyone 18 years of age or older for possession of alcohol. The linguistic differences among them do nothing to alter the constitutional question whether Congress may preempt what is, at bottom, a state-law repeal of a state-law prohibition. In each case, the answer is "no." After all, Congress could not have instructed the state to pass the original MDAA with its 21-year-old age cutoff in the first instance. It makes little sense to suggest that Congress can later entrench that cutoff by blocking its repeal, partial or otherwise.

What is more, like the statutes invalidated in *Printz* and *New York*, PASPA threatens to diminish accountability in our federal system. As noted above, PASPA has reinstated New Jersey's prohibition on sports gambling after the state's attempt to repeal those prohibitions. Under state laws that were enacted decades ago, casinos, racetracks, and their patrons once again face stiff sanctions for engaging in sports gambling.

Should resuscitation of the state's prohibitions prove unpopular, as seems likely, voters will face difficulty sorting out who is to blame: The state legislature for failing successfully to repeal the state's pro-

hibitions on sports gambling? The Casino Control Commission, Racing Commission, county prosecutors, or state judges for continuing to enforce those prohibitions? Congress for creating this mess? By blurring the lines of accountability the anti-commandeering rule was designed to sharpen, PASPA threatens to make New Jersey officials "bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York* v. *United States*, 505 U.S. 144, 169 (1992).

c. The cases cited by the court below do not provide any alternative basis on which to affirm its holding. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) and *F.E.R.C.* v. *Mississippi*, 456 U.S. 742 (1982) both involved federal statutes that merely encouraged states to assist with a federal regulatory program. See *Printz*, 521 U.S. at 926 (explaining that the statutes at issue in *Hodel* and *F.E.R.C.* merely made compliance with federal demands a "precondition to continued state regulation in an otherwise pre-empted field"). By contrast, PASPA offers no carrot, just a command to maintain existing state prohibitions on sports gambling.

South Carolina v. *Baker*, 485 U.S. 505 (1988) and *Reno* v. *Condon*, 528 U.S. 141 (2000) are likewise inapposite. Both upheld federal statutes that subjected the states' participation in the market (as bond issuers and database sellers) to the same regulations as their private counterparts. PASPA's "authorization" ban, by contrast, is designed precisely to constrain states as sovereign bodies. Compare 28 U.S.C.

§ 3702(1) (making it unlawful for states to "to sponsor, operate, advertise, promote, license, or authorize by law" sports gambling schemes) with *id.* at § 3702(2) (making it unlawful for a person to "sponsor, operate, advertise, or promote"—but *not* authorize or license—sports gambling). In other words, PASPA's prohibition against authorizing (or licensing) sports gambling is not generally applicable.

* * *

In sum, Congress has chosen an impermissible means to address its sports gambling problem. It has conscripted the aid of the states by preventing them from repealing their own prohibitions on sports gambling. The anti-commandeering rule does not permit this: to ensure the healthy functioning of our federal system, it requires Congress to assume the fiscal and political costs of its own regulatory programs. See, *e.g.*, Ernest A. Young, *Two Cheers for Process Federalism*, 46 Vill. L. Rev. 1349, 1360-61 (2001) (arguing that the anti-commandeering doctrine forces Congress to internalize the financial and political costs of its programs).

III. ENABLING CONGRESS TO OSSIFY STATE-LAW PROHIBITIONS WOULD UNDERMINE FEDERALISM BEYOND THE REALM OF SPORTS GAMBLING

This case has implications that extend far beyond sports gambling. The states have selectively repealed portions of prohibitions directed at a wide range of activities, often in the shadow of federal prohibitions that remain entrenched. The muddied reasoning of *Christie II* threatens to frustrate those efforts and erode the very notion of states as laboratories for democracy.

Consider, first, state marijuana law reforms. Over the past two decades, nearly every state in the nation has repealed a portion of its prohibition on the possession of marijuana.[5] *E.g.*, National Conference of State Legislatures, State Medical Marijuana Laws, Aug. 30, 2017, available at http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. Many have done so by adopting laws that bear a striking resemblance to the 2014 Law at issue here. For example, Colorado's Amendment 64 does not just repeal that state's prohibition on the possession of marijuana writ large; it selectively dictates who may possess marijuana (*e.g.*, adults but not minors), how much they may possess (one ounce or less), and where they may possess it (*e.g.*, at home but not in public), among other matters. See generally Colo. Const. art. XVIII, § 16. Many states have even repealed their marijuana laws using the magic word "authorization." *E.g.*, 22 Me. Rev. Stat. Ann. § 2423-A ("*Authorized* conduct for the medical use of marijuana. *** (1) **** a qualifying patient *may* [inter alia] *** [p]ossess up to 2 ½ ounces of prepared marijuana") (emphases added).

These acts of authorization-qua-repeal have been adopted in the shadow of a federal ban that criminal-

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[5] States have also adopted sundry regulations to replace those prohibitions. For example, Colorado's Retail Marijuana Code imposes a variety of product testing, packaging, and labeling requirements on state licensed marijuana suppliers. See Colo. Code Reg. 212-2.1501 & 1503 (2017). To the extent such requirements interfere with activity—*i.e.*, to the extent they go beyond repealing prohibitions—they are vulnerable to congressional preemption. Whether they are in fact preempted depends, of course, on congressional intent.

izes virtually all possession, manufacture, and distribution of marijuana for purposes of federal law. 21 U.S.C. §§ 841, 844; see *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001) (concluding that terms of the statute "leave no doubt that the [medical necessity] defense is unavailable" under the Controlled Substances Act, given Congress's determination that "marijuana has no medical benefits worthy of an exception").

Not surprisingly, the specter of preemption already looms large over this field. Numerous preemption challenges have been levied against state reforms. *See* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. Health Care L. & Pol'y 5, 6-7, 14-15 (2013) (citing examples). The holding of *Christie II* only adds fuel to the fire. *Christie II* suggests that the repeal of a state's marijuana prohibition is vulnerable to preemption, and that Congress could force some or all of the states to reinstate the broad prohibitions they had previously adopted (in some cases, decades earlier). Indeed, some litigants have already suggested that such state-law repeals are preempted by federal drug laws in part because they "authorize" the possession, manufacture, and distribution of marijuana. See Petition for Writ of *Certiorari*, *State of Nebraska and Oklahoma* v. *State of Colorado*, 2014 WL 7474136 (U.S. Dec. 18, 2014) (No. 144, Original) (claiming that Colorado's Amendment 64 is preempted, in part, because it "affirmatively *authorizes* conduct prohibited by federal law") (emphasis added).

Similarly, many states have created exceptions to broad state-law prohibitions on the possession of firearms in schools and in other circumstances. For

example, Georgia provides that its firearms ban does not apply to a "person who has been *authorized* in writing" by a school official to possess firearms on school grounds. Ga. Code Ann. § 16-11-127.1(c)(6) (emphasis added). Likewise, Michigan's ban does not apply to possession that is "with the *permission*" of a school official. Mich. Comp. Laws Ann. § 750.237a(5)(e) (emphasis added).

Once again, these state laws have been enacted against a backdrop of extensive federal regulation. The Gun Control Act of 1968 (GCA), 18 U.S.C. § 922, prohibits possession of firearms in a host of circumstances, including possession in a school zone, *id.* at § 922(q)(2)(A).

In light of the discrepancies between state and federal firearm laws, the reasoning of *Christie II* poses a threat to state laws that grant selective permission to possess firearms in circumstances not tolerated by federal law. Even if Congress presently defers to some state exceptions,[6] *Christie II* instructs that it is not bound to do so.

These and other examples demonstrate that the constitutional ramifications in this case will not be confined to the casinos and racetracks of New Jersey. Rather, the lower court's holding that state-law repeals are pre-emptible could potentially compel states to proscribe a host of activities that they have mindfully chosen *not* to penalize under state law.

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[6] It does so by expressly incorporating some of those exceptions into the provisions of the Gun Control Act. See, *e.g.*, 18 U.S.C. § 922(q)(2) (exempting from federal ban on firearms possession in school zone possession that has been "licensed *** by the State").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Nos. 16-476 & 16-477

IN THE

Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, ET AL.,
Petitioners,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Respondents.

NEW JERSEY THOROUGHBRED
HORSEMEN'S ASSOCIATION, INC.,
Petitioner,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is it constitutional for the Professional and Amateur Sports Protection Act to restrain the expansion of gambling in a manner consistent with *The Federalist No. 10*?

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1981 by Phyllis Schlafly, *Amicus Curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") has long opposed gambling. Phyllis

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. All the parties have filed blanket consents with the Court for the filing of this and other amicus briefs.

Schlafly supported a ban on lotteries and commercialized gambling. She supported enforcing a ban in all areas subject to federal jurisdiction, such as interstate commerce – which includes the internet and the banking system. She wrote multiple columns against gambling while exposing the real harm that it causes.

Eagle Forum ELDF has a direct and vital interest in this case to defend against the harm caused by the requested expansion in sports gambling.

SUMMARY OF ARGUMENT

The Professional and Amateur Sports Protection Act ("PASPA") fulfills James Madison's justification for the Constitution in *The Federalist No. 10*: protection by a broader republican government of individual states against harm by powerful factions. It is valid under the Constitution to epitomize what Madison promised as the primary reason for ratifying it. Pro-gambling interests are the kind of faction Madison feared, and he was right in predicting that individual states, even though republican in structure, cannot alone withstand such factions. A broader republican national government is needed to defeat the faction, and PASPA delivered just as Madison hoped.

One can hardly pretend that Madison's brilliant vision in *The Federalist No. 10* is somehow unconstitutional to realize. PASPA should be marveled at, not declared unconstitutional based on a distortion of the doctrine of "anti-commandeering." In PASPA, Congress chose a relatively non-intrusive means of combatting the spread of gambling, and

Congress took an approach that should be praised and emulated. Congress could have banned sports gambling outright, or banned all new forms of sports gambling, but instead allowed some flexibility in dealing with this vice. PASPA is an artful – and fully constitutional – way to achieve the Madisonian goal of defeating factions through use of a national republican government.

Far from infringing on the Tenth Amendment, PASPA adhered to it. But in a breathtaking elevation of form over substance, Petitioners and their *amici* try to gin up a state sovereignty issue where none exists. On behalf of the American people Congress has spoken, with overwhelming majorities, against expansions in wagering on sports. By so doing, Congress saved New Jersey from the pro-gambling faction, and saved the integrity of competitive sports – both professional and amateur – from the corrosive effects of addictive gambling.

If there are to be more restrictions on incursions by Congress into state sovereignty, this case is not the vehicle to establish such limits. No one can plausibly assert that gambling on national sports competitions is within the traditional domain of state authority, or that the federal government lacks power to regulate this inherently interstate activity. Many of the *amici* siding with Petitioners, such as the State *Amici*, are quick to deny that they even support legalizing sports gambling. An activity widely recognized as harmful, having no claim to being within the exclusive domain of state authority, is not a proper candidate for breathing some life into the Tenth Amendment.

Gambling has long been recognized as a vice prohibited by many state constitutions. Indeed,

among all addictions, gambling is correlated with the highest rate of suicide.[2] Gambling harms blacks, Hispanic, and Native American youths at twice the rate of whites.[3] Gambling harms poor people more than the rich, and exploits the uneducated more than the educated, resulting in greater economic inequality. Unlike other vices, gambling has no redeeming benefit for anyone. In extreme cases, gambling results in tragedies like the recent mass murder in Las Vegas by Stephen Paddock, the gambling addict who murdered 58 and then himself, while injuring more than 500 others. For most of American history, gambling has been properly outlawed, for very good reasons, and the Tenth Amendment does not exist for the federal judiciary to side with factions to inflict such money-making vices on the American people.

This case epitomizes the flaws in the legal philosophy of "law without values," where clear-cut values at stake are supplanted by sterile – and easily manipulatable – legal formalisms. An Act of Congress advanced the public good by limiting the expansion of the vice of gambling into national professional and amateur sports. The PASPA embodies the salutary principle set forth in *The Federalist No. 10*, where James Madison explained how our large republic exists for the very purpose of helping to prevent vices, like gambling, from being inflicted by factions in individual states.

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[2] http://www.knoxnews.com/story/life/2017/10/06/gambling-addiction-psychological-root-las-vegas-killings/739059001/ (viewed 10/12/17).

[3] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2737691/ (viewed 10/9/17).

ARGUMENT

I. PASPA EXEMPLIFIES THE MADISONIAN VISION IN *FEDERALIST NO. 10*, AND IS THEREBY CONSTITUTIONAL.

Perhaps the single greatest value of the Constitution, James Madison taught in *The Federalist No. 10*, is in authorizing a broader republican government to defeat factions that individual states alone cannot withstand:

> Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.

The Federalist No. 10 (J. Madison).[4]

By "faction", Madison meant precisely the sort of "special interest" of legalizing gambling on sports as presented in this case, which PASPA successfully restrains. Madison explained, with examples, what he meant by "faction":

> A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it ....

Id. A "rage" for sports gambling fits perfectly within Madison's list of examples of "improper or wicked project[s]," and individual states like New Jersey are unable to restrain the faction, even with a republican form of government. Madison predicted this, and

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[4] http://www.constitution.org/fed/federa10.htm (viewed 10/22/17).

urged the ratification of the Constitution so that a broader republican government – to wit, Congress – would be strong and diverse enough to put down the faction that individual states could not withstand.

The Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701, *et seq.*, exemplifies Madison's vision. Enacted 25 years ago, PASPA succeeded as a super-majority of congressmen and senators stood against an expansion in the wagering on sports. PASPA established that "[i]t shall be unlawful for ... a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" a sports wagering scheme. 28 U.S.C. § 3702(1). PASPA perfectly achieves Madison's dream that the national government combat and defeat factions that would inevitably arise and overwhelm individual states.

Many Supreme Court Justices have embraced this principle of Madison as set forth in this most famous of all *The Federalist* essays. Justice Scalia, for example, described Madison's vision as "prophesy" while concurring with an invalidation of a city's set-aside program. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 524, 109 S. Ct. 706, 738 (1989) (Scalia, J., concurring). *See also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1072 n.7 (1992) (Stevens, J., dissenting) ("This principle of generality is well rooted in our broader understandings of the Constitution as designed in part to control the "mischiefs of faction.") (quoting *The Federalist No. 10*).

As Madison explained further in his landmark essay:

> [T]he same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic, – is enjoyed by the Union over the States composing it.

The Federalist No. 10 (J. Madison).

One can hardly insist that the Tenth Amendment, which Madison helped draft, should be used to obstruct Madison's fundamental justification for the Constitution itself. Instead, Petitioners and their *amici* stand completely against Madison on his reasoning for creating a national republican government. Nothing in the arguments of Petitioners and their *amici* can be reconciled with Madison's understanding of why the national government should exist, and how it should combat factions.

Petitioners and many of their *amici* quote Madison, but not for his support of using the national government to defeat the harmful influence of factions in individual states, as PASPA so effectively does. Recognizing Madison as the authority he is, Petitioners, their State *Amici*, and additional supporting briefs rely heavily on Madison without ever mentioning his overriding concern of the pernicious effect on government of factions, which the pro-gambling forces obviously are.

PASPA does not "compel the States to enact or administer a federal regulatory program," as prohibited by this Court in *New York v. United States*, 505 U.S. 144, 188 (1992). Nor does PASPA relegate states to be "mere political subdivisions of the United States." *Id.* at 188. Rather, PASPA properly combats the pro-gambling faction while respecting the "'residuary and inviolable sovereignty'" of the states as

embodied in the Tenth Amendment. *Id.* (quoting *The Federalist No. 39*, p. 245 (C. Rossiter ed. 1961)). Nothing in PASPA "force[s] participation of the State's executive in the actual administration of a federal program." *Prinz v. United States*, 521 U.S. 898, 918 (1997).

PASPA does not "commandeer" any state legislature under any reasonable meaning of that term. Rather, PASPA merely ensures that expansion into sports gambling will not occur, and PASPA accomplishes that worthy goal in a laudatory manner. PASPA is as respectful of the states as possible while limiting the expansion of gambling.

James Madison could have written PASPA himself to combat the pro-gambling or similar faction. Indeed, it is difficult to imagine a finer fulfillment of Madison's justification for the national government to combat factionalism than this law. Simply put, PASPA exemplifies Madison's vision in *The Federalist No. 10* and in no way violates the Tenth Amendment.

II. MISUSING THE TENTH AMENDMENT TO UNLEASH SPORTS GAMBLING ILLUSTRATES THE BANKRUPTCY OF "LAW WITHOUT VALUES."

The "law without values" approach to jurisprudence has a superficial appeal, and over the years has been championed by individual justices such as Oliver Wendell Holmes, Jr. Yet this case illustrates how wrong that approach can be, as Petitioners urge a result that could unleash the vice of sports gambling on our Nation. Deciding cases such as this by ignoring the underlying values at stake is a judicial philosophy

that leads to moral bankruptcy, which should be rejected.

Gambling is plainly a harmful, destructive activity, and any opinions by this Court now should recognize as much. In 1905, this Court had no difficulty observing as follows:

> For a great many years past gambling has been very generally in this country regarded as a vice to be prevented and suppressed in the interest of the public morals and the public welfare.

Marvin v. Trout, 199 U.S. 212, 224 (1905).

In addition, many state constitutions from New York[5] to Washington[6] have restricted gambling, and at least one state constitution expressly described gambling as that "vice" that it is:

> "Gambling is a *vice* and the Legislature *shall* pass laws to *suppress* it." This declaration coupled with a mandate is a part of our fundamental law, Section 8, Article 19 of the Louisiana Constitution of 1921, just as it was contained in previous Constitutions of this state.

Gandolfo v. La. State Racing Com., 227 La. 45, 72-73, 78 So. 2d 504, 514 (1954) (Hamiter, J., dissenting, emphasis in original). *See also Primm v. Reno*, 70 Nev. 7, 12, 252 P.2d 835, 837 (1953) (the "business of gambling ... is capable of being so conducted as to be ***a source of evil***") (emphasis added). This Court should likewise recognize the values at issue here.

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[5] N.Y. CONST. Art I, § 9.

[6] WASH. CONST. Art II, § 24.

As Phyllis Schlafly observed in 2014, "For those who promote legalized gambling as a means of economic development or revitalization, or as a painless way to pay for public schools, the recent news from Atlantic City, New Jersey, is sobering." Phyllis Schlafly, "Where's the Payoff in Gambling?" (Sept. 9, 2014).[7] She explained that "New Jersey voters succumbed to a slick campaign that promised to remake the fading resort [of Atlantic City] into Las Vegas East," with the ultimate result a massive unemployment rate and a towering 57-story casino hotel worth only a fraction of what it cost to build with taxpayer funds. *Id.* The Atlantic City failure story is by no means unique; Phyllis Schlafly's hometown of Alton, Illinois, was likewise crippled by riverboat gambling there. *See id.*

New Jersey voters learned from their prior mistakes. Amid all the talk of "state sovereignty" in briefs filed in support of sports gambling in this case, in fact New Jersey voters subsequently rejected an expansion in gambling the most recent time it was on the ballot. By a record-breaking landslide vote of 78-22%, a referendum in 2016 to expand gambling to northern New Jersey lost by the biggest margin of any referendum in the history of the State.[8] This result occurred despite how more than $24 million was spent on the referendum, by far the most ever on such a ballot initiative in this state.

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[7] https://www.creators.com/read/phyllis-schlafly/09/14/wheres-the-payoff-in-gambling (viewed 10/10/2017)

[8] http://www.nj.com/politics/index.ssf/2016/11/nj_voters_reject_north_jersey_casino_proposal_by_a.html (viewed 10/10/2017)

Yet under a "law without values" approach, none of the above would matter. Despite having an unrivaled talent for the law, Justice Holmes lost the influence he should have attained, because he went down the wrong road of "law without values" as explained in a biography of him by Professor Alschuler. *See* Albert W. Alschuler, "Law Without Values: The Life, Work, and Legacy of Justice Holmes" (2000). Ignoring the values at issue in a case is a recipe for reaching an incorrect result. Deciding this or any case without some recognition of the underlying values, which are compelling here against expanding gambling, would constitute an unwanted triumph of form over substance. Justice Holmes's philosophy led him to rule in favor of forced sterilization of a defenseless woman because he interpreted the state law as allowing it and he ignored compelling values that would have stopped it. *Buck v. Bell*, 274 U.S. 200 (1927).

No legal philosophy worth its salt would fail to recognize the underlying values. Congress properly enacted PASPA to combat a vice.

III. *CERTIORARI* SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Attempts to convert this case into some kind of historic precedent about federalism, the Tenth Amendment, state sovereignty, or even a landmark to allow states to legalize marijuana, are entirely misplaced. This is not a case about state sovereignty, but is an attempt by the pro-gambling faction to expand its profits at the disproportionate expense of minority youths, the poor, and the less educated.

Any precedent set by this Court on these unique facts will distort the broader anti-commandeering

principles. Far from clarifying this field of law, a ruling in this case could both harm the public by opening the floodgates to sports gambling, and distort the law in other areas where Congress has also acted properly to limit a vice related to an activity that is inherently interstate. "Bad facts make bad law" is an aphorism that applies here, and this Court should decline the opportunity to make "bad law" in a misplaced quest to try to bolster state sovereignty.

The Acting Solicitor General urged this Court not to grant *certiorari* in this case, which involves an unusual fact pattern and substantial confusion about the effect of a decision here. The Acting Solicitor General was right. The petitions for *certiorari* should be dismissed for having been improvidently granted.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed or the petitions for *certiorari* should be dismissed for having been improvidently granted.

Dated: October 23, 2017

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR EUROPEAN SPORTS SECURITY ASSOCIATION, THE IDEVELOPMENT AND ECONOMIC ASSOCIATION, AND THE REMOTE GAMBLING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are the European Sports Security Association ("ESSA"), the iDevelopment and Economic Association ("iDEA"), and The Remote Gambling Association ("RGA"). ESSA is a Brussels-based non-profit gaming security organization. iDEA, located in Washington, D.C., is a trade association acting on behalf of the online interactive entertainment industry, including sports betting. The RGA's members include most of the world's largest and most respected gaming companies (terrestrial and online) based in Europe; it strives to protect the integrity of sports, working with government and regulators to develop anti-corruption guidelines and consistent sanctions.[1]

Amici's members comprise several dozen businesses that offer sports gaming, including many based in the United States. Members have deep and broad experience in sports gaming, regulating it to protect the sports industry, and experimenting with the approaches of different jurisdictions. In this sense, the U.S.-based members have worked with many states to conduct the "social and economic experiments without risk to the rest of the country" that make them "laboratories of democracy". *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). They, and their European counterparts, have built their businesses around the practical—if severe—limitations PASPA has imposed on *legal* businesses in the quarter century since Congress enacted it.

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1. All parties have consented to the filing of this brief. Amici affirm that no counsel for any party authored this brief in whole or in part and that no party or counsel for a party made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Professional and Amateur Sports Protection Act ("PASPA" or the "Act") is unconstitutional and the Court should vacate the ruling of the court below.[2]

First, PASPA violates the "fundamental principle of equal sovereignty" articulated by the Court in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193, 203 (2009), and adopted in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013).

Congress enacted PASPA on October 28, 1992. *See* Pub. L. No. 102-559, 106 Stat. 4227 (codified at 28 U.S.C. §§ 3701 *et seq.*). It prohibited approximately 45 state legislatures from authorizing sports gambling. *See* 28 U.S.C. §§ 3701 *et seq.* Even though gaming regulation had been a traditional state regulatory function, Congress intervened on the theory that sports gaming had become a moral hazard of interstate proportions. Yet despite that determination, Congress chose *not* to ban sports gaming on a nationwide basis. It added so-called "grandfathering clauses" to PASPA that exempted four states from the ban, and eventually additional states. *See* 28 U.S.C. § 3704. Congress permitted *those* states to grow their sports gaming businesses. As we show below, however, both the record and facts of which the Court may take judicial notice make it clear that (i) PASPA's statutory scheme violates the principle of equal sovereignty and

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2. Amici agree with the arguments set forth in Petitioners' merits briefs in all respects. Should the Court not strike down PASPA in its entirety on the grounds articulated by Petitioners, amici offer the Court the alternative doctrinal basis to do so.

(ii) Congress had no factual basis to justify it (and the evidence against the statute has grown in the years since).

Congress is not permitted to decide how to license an entire industry *de facto*, choosing those few states who will have the chance to succeed and those who will not. Under *Shelby County*, it may *not* do so, at least where it has no factual justification. At a minimum, Congress must make *some* effort to justify treating sovereign states disparately. It must do so, moreover, in light of *current* social, economic and cultural conditions. *See Shelby County*, 133 S. Ct. at 2629–30 (requiring Congress to explain why disparate treatment "makes sense in light of current conditions" and takes account of "current needs"); *cf. Citizens United v. Federal Election Commission*, 558 U.S. 310, 370 (2010).[3] *Whatever* the standard of review to which the Court subjects PASPA under the equal sovereignty principle, PASPA cannot survive it because it cannot meet the evidentiary burden of either level of scrutiny.

If anything, the evidence of "current" conditions adds to finding PASPA unconstitutional. When Congress enacted PASPA, Americans had yet to elect Bill Clinton; the iPhone would not be introduced for another 15 years. In the last quarter century, massive cultural and social and technological changes have rendered sports gambling demonstrably regulable; amici's member-businesses have extensive expertise and experience doing so. They have

3. "[M]any of Congress' findings in passing BCRA were premised on a system without adequate disclosure. With the advent of the Internet, prompt disclosure . . . can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable." (citation omitted).

devoted massive resources to addressing all concerns with sports gambling. They have done so successfully. (In fact, the most discernible change in the sports betting business that PASPA has produced is to have driven the market for *illegal* sports gambling to those jurisdictions most willing to tolerate it but not permitted to legalize it. New Jersey, of course, is not one of those jurisdictions.). For these and other reasons, PASPA's so-called "grandfathering clauses" exempting some states from certain kinds of sports gaming, 28 U.S.C. § 3704, are unconstitutional.

Second, PASPA must be struck down in its entirety. The grandfathering clauses are integral to the entire PASPA statutory scheme. If they fall, the whole statute must fall. They are not severable from PASPA.

Finally, amici urge the Court to rule on the merits of PASPA *now*. First, the constitutional issues this matter raises transcend sports gambling; they involve fundamental questions of federalism. Second, numerous states have contemplated, and currently are evaluating, whether to enact sports gambling-related legislation. Particularly given the many years this litigation has continued, amici respectfully submit that the Court render a complete ruling on the merits. Otherwise, future litigation on the merits of PAPSA's constitutionality will continue indefinitely, in this case or in some other jurisdiction.

ARGUMENT

I. PASPA Only Bans Some States from Authorizing Sports Gambling or Wagering Schemes.

PASPA's Section 3702 purports to make it unlawful for *any* "governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" any form of sports gambling. 28 U.S.C. § 3702. However, the Act carves out a series of exemptions that grant preferential treatment to some states while discriminating against the majority of states. *Id.* § 3704(a).

First, PASPA states that its nationwide ban does not apply to lotteries or other wagering schemes "conducted by [a] State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990." *Id.* § 3704(a)(1). Second, the Act exempts wagering schemes that were both "authorized by a statute as in effect on October 2, 1991" and were conducted between September 1, 1989 and October 2, 1991. *Id.* § 3704(a)(2). Third, Congress exempted any wagering scheme "conducted exclusively in casinos located in a municipality" to the extent that the scheme "was authorized, not later than one year after the effective date of this chapter" and where "any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on [the effective date of this chapter]." *Id.* § 3704(a)(3). Finally, "parimutuel animal racing or jai-alai games" are also exempt. *Id.* § 3704(a)(4).

The effect of these exemptions—known also as the grandfathering clauses—is to ensure that a few states can provide sports gambling while the majority of states

are forever prohibited from legalizing sports gambling. While PASPA does not identify which states are permitted to offer sports gambling within their borders, Congress made no secret of its desire to protect Nevada and other, select states while drafting and debating PASPA. For example, in February 1991, Senator Dennis DeConcini of Arizona, who introduced the bill that would become PASPA, stated: "I feel it is unfair to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to the introduction of this legislation" and "I have no intention of threatening the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling, as an essential industry." 137 Cong. Rec. S2256-04, S2257 (daily ed. Feb. 22, 1991) (statement of Sen. DeConcini). This same sentiment persisted throughout the legislative process. When the Senate Committee on the Judiciary issued its reports on the bill, the Committee stated that they had "no wish to apply this new prohibition retroactively to Oregon or Delaware," had no "desire to threaten the economy of Nevada," and did not want to "prohibit lawful sports gambling schemes in other States that were in operation when the legislation was introduced." S. Rep. No. 102-248, at 8 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3559.

Senator Chuck Grassley of Iowa objected to the bill's grandfathering provisions and noted that "[t]here is simply no rational basis, as a matter of Federal policy, for allowing sports wagering in three States, while prohibiting it in the other 47." *Id.* at 13, *reprinted in* 1992 U.S.C.C.A.N. at 3563. In response, Senator DeConcini answered simply: "[T]he Senator from Iowa makes an argument that this bill is not fair. Well, the world is not always fair, I must

admit, and I think he will admit it is not fair." 138 Cong. Rec. S7274-02, S7281 (daily ed. June 2, 1992) (statement of Sen. DeConcini).

Ultimately, PASPA accomplishes exactly what Congress set out to do. It imposes a regulatory scheme that prevents some states, *but not all*, from authorizing sports wagering.

II. PASPA's Grandfathering Clauses Are Unconstitutional Because They Violate the Principle of Equal Sovereignty by Treating States Differently without Justification.

PASPA was intended to treat states unequally. Without justification, that disparate treatment violates the equal sovereignty doctrine. *See Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 434 (1892) ("There can be no distinction between the several states of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within their respective limits."). Congress did not enact PASPA to remedy some "local evil[]", *Nw. Austin Mun. Util. No. One v. Holder*, 557 U.S. 193, 203 (2009) ("The doctrine of the equality of States does not bar remedies for *local* evils which have subsequently appeared." (emphasis in original, internal quotation marks omitted)); rather it simply decided to take an entire industry into its hands and pick winners and losers among states of otherwise equal status.[4]

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4. Unlike the Voting Rights Act, for example, PASPA did not target individual states where sports gambling was an acute problem. The reverse is true. PASPA *exempts* states where

In *Shelby County, Alabama v. Holder*, the Court affirmed that "[n]ot only do States retain sovereignty under the Constitution, there is also a fundamental principle of equal sovereignty among the States." 133 S. Ct. 2612, 2623 (2013) (internal quotation marks omitted); *see also Escanaba & Lake Mich. Transp. Co. v. Chicago*, 107 U.S. 678, 689 (1883) ("Equality of constitutional right and power is the condition of all the states of the Union, old and new."). This principle of equal sovereignty is "highly pertinent in assessing subsequent disparate treatment of States." *Shelby County*, 133 S. Ct. at 2624. If Congress wants to treat the states unequally, it "must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions." *Id.* at 2629. More specifically, "[a] statute's current burdens must be justified by current needs, and any disparate geographic coverage must be sufficiently related to the problem that it targets." *Id.* at 2627 (internal quotation marks omitted).

At issue in *Shelby County* was that portion of the Voting Rights Act ("VRA"), 52 U.S.C. §§ 10101 *et seq.*, that imposed more stringent requirements on some states in enacting election-related laws. "Covered" states—states subject to the more stringent requirements—were prohibited from changing their voting procedures without first obtaining "preclearance" from the federal government. *Shelby County*, 133 S. Ct. at 2620. Because the formula for determining which states qualified as "covered" had remained unchanged since 1975, the Court

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sports gambling already existed. Indeed, rather than banning sports gambling nation-wide, PASPA grants the chosen states a legislation-sanctioned monopoly in an industry and market that PASPA bans in a majority of the country.

held that Congress had not sufficiently justified the disparate treatment of "covered" states under the VRA in a way that made sense "in light of current conditions," adding that Congress could not "rely simply on the past." *Id.* at 2629. As a result, the Court held unconstitutional the VRA provision determining what states qualified as "covered." *Id.* at 2631.

In this case, PASPA raises similar problems. PASPA's selective exemption of specific states from an otherwise nationwide ban (1) is not related to the problem that PASPA targets and (2) places an unjustified burden on non-exempt states in light of current conditions and needs. PASPA therefore violates the equal sovereignty doctrine.

A. PASPA's Grandfathering Clauses Are Unrelated to the Problem that PASPA Targets and Undermine the Act's Effectiveness.

PASPA's grandfathering clauses do not address the problem that Congress sought to resolve in passing PASPA: banning (or limiting) sports gambling in America. In introducing the Act, Senator DeConcini stated that he and a co-sponsor "feel strongly it is inappropriate for the States to trade on the good will of professional and amateur sports and in the process risk causing serious harm to the integrity of sports," adding that "[PASPA] represents a different, and broader, approach to the *problem of sports gambling*." 137 Cong. Rec. S2256-04, S2257 (daily ed. Feb. 22, 1991) (statement of Sen. DeConcini) (emphasis added). Later, the Senate Committee on the Judiciary wrote that "[s]ports gambling is a national problem. The harms it inflicts are felt *beyond the borders of those States that sanction it*. The moral erosion it produces *cannot*

be limited geographically." S. Rep. No. 102-248, at 5, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556 (emphasis added). PASPA therefore "represents a judgment that sports gambling—whether sponsored or authorized by a State or other governmental entity—is a problem of legitimate Federal concern for which a Federal solution is warranted." *Id.* at 6–7, *reprinted at* 1992 U.S.C.C.A.N. at 3557–58.

Despite these findings, Congress chose to include grandfathering clauses in PASPA so that "Oregon and Delaware may conduct sports lotteries on any sport" and "casino gambling on sports events may continue in Nevada." *Id.* at 10, *reprinted at* 1992 U.S.C.C.A.N. at 3561; 28 U.S.C. § 3704(a). However, the grandfathering clauses create geographic exemptions to a solution for a problem that "cannot be limited geographically" and undermine PASPA's intent and power to deal with the problem of sports gambling. S. Rep. No. 102-248, at 5, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556 (emphasis added). And while Congress urged that the "narrowness" of the grandfathering clauses reflected a "policy judgment that sports gambling should be strictly contained," their inclusion nevertheless diminishes PASPA's power to deal with a problem that can inflict harm "beyond the borders of those States that sanction it." *Id.* at 5, 10, *reprinted at* 1992 U.S.C.C.A.N. at 3556, 3561.

Moreover, Congress recognized that the grandfathering clauses undermined PASPA's purpose. Senator Orrin Hatch of Utah stated that Congress "agreed to grandfathering because we had no choice" and that it "would have been better off to have banned all State sponsored sports gambling." 138 Cong. Rec. S7274-02,

S7278 (daily ed. June 2, 1992) (statement of Sen. Hatch). Senator DeConcini echoed the same sentiment, noting that "I would like to have it effective on all 50 States but that is not in the cards." *Id.* at S7280 (statement of Sen. DeConcini). As Senator Grassley put it: "[I]f what you propose is good for the country, then it also ought to be good for Oregon, Delaware, Nevada, and Montana; they should not have these exemptions . . . . There is not a prohibition on sports gambling; it is a piece of Swiss cheese." *Id.* (statement of Sen. Grassley).

In *Shelby County*, the Court found that the VRA's formula for determining which states were required to obtain "preclearance" was no longer relevant to addressing the problem of voting discrimination. 133 S. Ct. at 2627–28 ("The coverage formula met that test in 1965, but no longer does so."). The Court therefore struck down the VRA's formula provision because Congress had failed to make the necessary "showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 2622.

Here, PASPA's grandfathering clauses have *never* addressed the problem that Congress sought to prevent—in fact, as discussed more fully in Section II.B below, they have undermined Congress' efforts. The grandfathering clauses are therefore not "sufficiently related" to the problem of sports gambling in America. *Cf. Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 179 (1999) ("[PASPA] includes a variety of exemptions, some with obscured congressional purposes . . . ."). As a result, PASPA's grandfathering clauses violate the fundamental principle of equal sovereignty and are unconstitutional.

B. PASPA's Exemptions Place an Unjustifiable Burden on Non-Exempt States in Light of Current Conditions and Needs.

Because PASPA's grandfathering clauses bear no relation to the problem of sports gambling, they place an unjustifiable burden on non-exempt states in light of current conditions and needs. Furthermore, PASPA's discriminatory regime remains in perpetuity. As a result, it cannot be said that PASPA takes into account current societal views on sports gambling, the recognizable spread of illegal sports gambling markets, or the harm that non-exempt states have suffered and will continue to suffer. PASPA's grandfathering clauses violate the Court's admonition that Congress "cannot rely simply on the past" when it treats states differently. *Shelby County*, 133 S. Ct. at 2629.

Current conditions only underscore the failure of the grandfathering clauses to limit the spread of sports gambling. Nevada's sports gambling business has grown exponentially in the twenty-five years since PASPA was enacted, attracting customers from across the United States. According to one analysis, in the last decade alone, Nevada's sports betting business grew from $2.4 billion in 2006 to a projected $5 billion in 2016.[5] This is a marked departure from the late 1990s when "casinos were plotting to downsize sports books." *Id.* Nevada has even gone so far as to pass a law "authorizing business

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5. *See* Matt Youmans, *Nevada sports betting could be a $5 billion industry*, Las Vegas Review-Journal (May 8, 2016), *available at* https://www.reviewjournal.com/sports/sports-columns/matt-youmans/nevada-sports-betting-could-be-a-5-billion-industry/.

entities in Nevada to place wagers on behalf of investors from around the world." *Id.*

This great expansion of sports gambling in Nevada is fueled, in part, by changes in technology and culture. *Id.* ("Mobile phone apps and increased mainstream media coverage of sports betting are two major parts of the equation."). Today, Americans have access to high-speed internet, mobile phones, and almost ubiquitous wireless connectivity. In 1992, by contrast, the Internet as it is known today did not yet exist—the "World Wide Web" software was still a year away from being in the public domain, America Online was still only available for MS-DOS, consumers used dial-up modems, and the iPhone was still more than a decade away.[6]

Culturally, too, things have changed. For example, the major professional sports organizations currently recognize the importance of Nevada (and legal sports gambling) to the sports industry:

- The National Hockey League recently formed a team called the Vegas Golden Knights in Nevada that is set to debut during the 2017–2018 season, while the Oakland Raiders of the National Football League will relocate to Nevada and be rebranded as the Las Vegas Raiders within a few years.[7]

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6. *See, e.g.*, *The birth of the web*, CERN, http://home.cern/topics/birth-web (last visited Aug 27, 2017).

7. Cody Paul Laska, *Las Vegas' hockey expansion team is a test of the sport's appeal*, CNBC (Feb. 12, 2017), *available at* https://www.cnbc.com/2017/02/10/las-vegas-hockey-expansion-team-is-a-test-of-the-sports-appeal.html; Adam Stites, *Raiders*

- In April 2017, when asked about the Oakland Raiders' planned move to Las Vegas, National Football Association commissioner Roger Goodell said that the League did not plan to exercise their right under Nevada law to request that Nevada sports gambling operations not take bets on the Raiders' games. According to Goodell, the NFL was not considering the option "in large part because you have the regulatory environment there, which actually could be beneficial in this case."[8]

- The National Basketball Association conducts part of its Summer League in Nevada and has a minor league team in Nevada.[9]

- In a New York Times editorial, NBA commissioner Adam Silver stated that legalizing sports gambling would move betting "out of the underground and into the sunlight where it can be appropriately monitored and regulated."[10]

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will relocate from Oakland to Las Vegas, SBNation (Mar. 27, 2017), *available at* https://www.sbnation.com/2017/3/27/15060642/las-vegas-raiders-relocation-move-oakland-nfl-vote.

8. David Purdum, *Roger Goodell says NFL still opposed to legalized sports betting*, ESPN (Apr. 7, 2017), *available at* http://www.espn.com/chalk/story/_/id/19027576/nfl-commissioner-roger-goodell-says-league-opposed-legalized-sports-betting-raiders-moving-las-vegas; *see also* Nev. Gaming Reg. 22.120(1)(d).

9. *See 2017 NBA Summer League*, NBA, http://www.nba.com/summerleague/ (last visited Aug. 27, 2017).

10. Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. Times (Nov. 13, 2014), *available at* https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html.

- Major League Baseball commissioner Rob Manfred, likewise, has noted that the league is "reexamining [their] stance on gambling."[11]

- Four college basketball conference championships are held in Las Vegas: Mountain West, Pac-12, Western Athletic, and West Coast.[12]

- In a recent interview about the prospect of holding the NCAA March Madness tournament in Las Vegas, Dan Gavitt, the NCAA's "senior vice president for basketball who runs the NCAA Tournament," expressed a belief that Las Vegas could work as a regional or Final Four site, adding that he thinks "there's some interest within the membership to host championships given there's four conferences that play their championships in Las Vegas."[13]

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11. Matt Bonesteel, *While Trump mulls it over, MLB's Rob Manfred continues to soften stance on legalized sports gambling*, Wash. Post (Feb. 8, 2017), *available at* https://www.washingtonpost.com/news/early-lead/wp/2017/02/08/while-trump-mulls-it-over-mlbs-rob-manfred-continues-to-soften-stance-on-legalized-sports-gambling.

12. *NCAA Basketball Conference Tournament Schedule*, CBS Sports, https://www.cbssports.com/collegebasketball/schedules/conference-tournament (last visited Sept. 1, 2017).

13. Steve Carp, *Las Vegas still on outside looking in for hosting NCAA championships*, Las Vegas Review-Journal (April 2, 2017), *available at* https://www.reviewjournal.com/sports/basketball/ncaa-tournament/las-vegas-still-on-outside-looking-in-for-hosting-ncaa-championships/.

Moreover, Congress' attempt to curb the problem of sports gambling in the United States has led to the rise of a well-entrenched industry of illegal and unregulated sports gambling. In 1991, according to one estimate, the illegal sports betting market was $40 billion per year.[14] Now, the market for illegal sports betting has ballooned to an estimated $400 billion—a ten-fold increase since PASPA was signed into law. *Id.*

And while in a legalized sports-betting market States could have established regulatory protections for vulnerable citizens (*e.g.*, problem gamblers and children), PASPA—and particularly the Third Circuit's reading of PASPA—prevents States from doing so. Without PASPA, States could enforce age restrictions, *see, e.g.*, Nev. Rev. Stat. § 463.350 (prohibiting wagering by persons under twenty-one years of age); *see also* Gambling Act, 2005, c. 19, pt. 4 (U.K.) ("Protection of Children and Young Persons"), and provide protections for problem gamblers, *see* Nev. Gambling Reg. 5.170 (requiring casinos to establish programs to address problem gambling). Similarly, they could establish mechanisms to investigate allegations of wrongdoing, *see* Nev. Rev. Stat. § 463.310 (providing for investigations by Gaming Control Board), and provide protections against fraud and abuse that customers enjoy in any legal transaction.

In all, Congress' 1992 determination of which states should be subject to a ban on sports gambling legislation

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14. Michelle Minton, *Take a Gamble on Sports Betting*, U.S. News (Feb. 3, 2017), *available at* https://www.usnews.com/opinion/op-ed/articles/2017-02-03/on-super-bowl-sunday-americans-will-break-the-law-against-sports-gambling.

is unjustifiable in light of current needs and conditions. All that PASPA accomplished (and continues to accomplish) is to grant Nevada a monopoly over legalized sports gambling while doing nothing to curb the growth of illegal sports betting throughout the United States. Worse, PASPA does not expire or contain any mechanism by which Congress could reassess its determination of which states are or should be exempt from the nationwide ban. *See, e.g.*, *Shelby County*, 133 S. Ct. at 2620 (noting that Congress had to reauthorize the VRA).

"Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions." *Shelby County*, 133 S. Ct. at 2629. Instead of accounting for current conditions, however, PASPA continues to restrict state legislatures based on an analysis that is a quarter-century old. This violation of the equal sovereignty doctrine renders PASPA unconstitutional; PASPA imposes "current burdens and must be justified by current needs." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009); *cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

III. PASPA Must Be Struck in Its Entirety Because the Grandfathering Clauses are Not Severable.

When part of a statute is unconstitutional, the Court "tr[ies] to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*,

561 U.S. 477, 508 (2010) (internal quotation marks omitted). The method for determining whether portions of a statute are severable is "well established." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* at 685 (internal quotation marks omitted). The critical question for severability is "whether the statute will function in a *manner* consistent with the intent of Congress." *Id.* Here, it is clear that Congress would never have enacted PASPA without the grandfathering clauses. As a result, the grandfathering clauses cannot be severed, and PASPA must be struck down in its entirety.

Although PASPA contains a blanket prohibition on states legalizing sports gambling, the grandfathering clauses ensure that states like Nevada, Oregon, Delaware, and Montana are exempt from this prohibition. PASPA's legislative history reveals that the grandfathering clauses are necessary components of PASPA. When PASPA was first introduced for debate in the Senate, its co-sponsor, Senator DeConcini, stated that he had "no intention of threatening the economy of Nevada" or applying the proposed law "retroactively to Oregon or Delaware." 137 Cong. Rec. S2256-04, S2257 (daily ed. Feb. 22, 1991) (statement of Sen. DeConcini). The Senate Committee on the Judiciary stated its intent not to "threaten the economy of Nevada" or "apply this new prohibition retroactively to Oregon or Delaware." S. Rep. No. 102-248, at 8, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3559. The reason for these exemptions was clear: Congress did not want to "prohibit lawful sports gambling schemes . . . that were in operation when the legislation was introduced." *Id.*

The grandfathering clauses are critical to the statutory scheme to prevent harm to the exempt states. For example, severing the grandfathering clauses and leaving the prohibition in place would destroy Nevada's $5 billion sports gambling industry. In addition, it would result in an unconstitutional taking against those private businesses who engaged in legal sports gambling prior to the grandfathering clauses being removed. *See, e.g.*, *Eastern Enters. v. Apfel*, 524 U.S. 498, 522–23 (1998). Without the clauses, PASPA is "legislation that Congress would not have enacted." *Alaska Airlines*, 480 U.S. at 686.

Accordingly, because Congress never intended to universally ban sports gambling in the United States, PASPA should be struck down in its entirety.[15]

IV. PASPA Fails To Achieve Congress' Objective and Fails Even Under Rational Basis Review.

As suggested above, PASPA is wholly inadequate to address what Congress considered to be the problem of sports gambling in the United States. More than that, it fails to adequately accomplish its purpose of stopping the spread of sports gambling. In this way, PASPA not only fails under an equal sovereignty analysis, *see* discussion *supra*, but also cannot be justifiably defended under a rational basis review.

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15. If PASPA is struck in its entirety, there will be little to no immediate change. States will need to decide whether to legalize sports gambling within their borders and, if they do, they will need to implement a regulatory framework before sports gambling can occur.

Arguably, Congress had two legitimate objectives in enacting PASPA: First, to stop the spread or curtail the presence of sports gambling in the United States. Second, to maintain the integrity of professional sports. In both instances, the Act (and its mechanism of simply freezing in place state legislation on sports gambling) is not rationally related to these intended objectives. *See Quinn v. Millsap*, 491 U.S. 95, 107 (1989) (striking down a state statute that fails under "rationality review"); *Turner v. Fouche*, 396 U.S. 346, 362 (1970) (noting that the "traditional test" is "whether the challenged [statute] rests on grounds wholly irrelevant to the achievement of a valid state objective").

A. PASPA is not rationally related to stopping the spread or curtailing the presence of sports gambling in the United Sates.

As has already been noted, the Senate committee report acknowledged that sports gambling is a problem that causes harm "beyond the borders of those States that sanction it" and "cannot be limited geographically." S. Rep. No. 102-248, at 5, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556. It is not rational, therefore, that Congress sought to curb and/or eliminate sports gambling in the United States by explicitly allowing some states — Nevada being the obvious example — to maintain their sports gambling regimes.

In fact, PASPA has enabled the existing legalized sports gambling regimes to grow exponentially into multi-billion-dollar endeavors such as Nevada's $5 billion sports betting market for 2016.[16] This, in turn, affects out-

16. *See* Matt Youmans, *Nevada sports betting could be a $5 billion industry*, Las Vegas Review-Journal (May 8, 2016), *available*

of-state residents as well. Not only can residents of other States travel to Nevada to engage in sports betting, but there are an increasing number of ways for out-of-state residents to place bets (or at least profit from placed bets). For example, Nevada has enacted legislation "authorizing business entities in Nevada to place wagers on behalf of investors from around the world."[17] Likewise, Nevada enacted legislation that allowed out-of-state investors to pool their money into "entity wagering" funds and place bets in Nevada's legalized sports betting market.[18] While investors cannot dictate what bets the fund ultimately makes, it is another way that sports betting has spread throughout the United States.

This is to say nothing of PASPA's failure to prevent the spread of *illegal* sports gambling, which has grown its influence and reach by leaps and bounds since PASPA was signed into law. Indeed, Americans have shown an interest in betting on sports whether legal or not; for example, placing approximately $10 Billion in bets on the "March Madness" college basketball tournament in 2017, only $300 Million of which (just 3%) was in the form of *legal* wagers.[19] In 1976, the Commission on the Review of the

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at https://www.reviewjournal.com/sports/sports-columns/matt-youmans/nevada-sports-betting-could-be-a-5-billion-industry/.

17. *Id.*

18. Ben Mathis-Lilley, *Betting on Sports With Out-of-State Investors' Money Is Now Legal in Nevada*, Slate (June 4, 2015), *available at* http://www.slate.com/blogs/the_slatest/2015/06/04/nevada_sports_betting_investment_funds_out_of_state_entity_wagering_allowed.html.

19. Press Release, *March Madness Betting to Top $10 Billion*, Am. Gaming Ass'n (Mar. 13, 2017), *available at* https://www.americangaming.org/newsroom/press-releasess/march-madness-betting-top-10-billion.

National Policy Towards Gambling noted that "[g]ambling is inevitable. No matter what is said or done by advocates or opponents in all its various forms, it is an activity that is practiced, or tacitly endorsed, by a substantial majority of Americans." Comm'n on the Review of the Nat'l Policy Toward Gambling, *Gambling in America: Final Report of the Commission on the Review of the National Policy Toward Gambling* 1 (1976). Nothing has changed in the public's attitude since the Commission's pronouncement in 1976, but the availability of gaming has exploded with the ubiquity of the Internet.

Overall, the market for illegal sports betting and betting conducted through off-shore websites (that might otherwise be legal under their locals laws) accounts for upwards of $400 billion and allows residents of *any* state to wagers on sport events.[20] Based on the amount of money illegally wagered on sports each year, estimates place the United States as potentially the largest sports gambling market in the world.[21] Of course, PASPA was never designed to effectively prevent the spread of illegal sports gambling since it did not affirmatively criminalize sports gambling on a federal (or even state) level; it instead made it unlawful for *States* to legislate effectively on the matter.

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20. Michelle Minton, *Take a Gamble on Sports Betting*, U.S. News (Feb. 3, 2017), *available at* https://www.usnews.com/opinion/op-ed/articles/2017-02-03/on-super-bowl-sunday-americans-will-break-the-law-against-sports-gambling.

21. David Purdum, *Research shows U.S. could dominate global legalized sports betting market*, ESPN.com (Sept. 9, 2015), *available at* http://www.espn.com/chalk/story/_/id/13614240/research-shows-united-states-dominate-global-legalized-sports-betting-market.

The reason that PASPA has done little in the way of accomplishing Congress' goal of curbing the spread and presence of sports gambling, of course, is that Congress' chosen solution—a ban on sports gambling legislation in select states—is not rationally related to the ultimate goal. Thus, while "[t]he Constitution does not prohibit legislatures from enacting stupid laws," it does prohibit enacting laws that cannot even withstand a rational basis review. *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (Stevens, J., concurring).

B. PASPA is not rationally related to safeguarding the integrity of professional sports.

As with the spread of sports gambling (both legal and illegal), PASPA does little to prevent corruption or malfeasance in professional sports. Indeed, a selective ban on sports gambling legislation at the state level is not designed—nor rationally related—to safeguarding the integrity of professional sports. A plausible (let alone rational) basis for enacting such a ban exists only if *legalized* sports gambling actually leads to increased corruption. But this is far from a demonstrable fact.

To begin with, setting aside recent controversies such as "Deflate-Gate," corruption exists in professional sports despite PASPA:

- Several players—including at the college basketball level—were found to have received payments to influence the final scores of their games.[22]

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22. Mike Fish, *Six ex-players charged with conspiracy*, ESPN (May 6, 2009), *available at* http://www.espn.com/college-

- An NBA referee admitted to betting on games that he was officiating and passing tips regarding those games to associates in exchange for money.[23]

- Players on a college basketball team were caught providing tips and information to their former coach and his bookie in exchange for money.[24]

Indeed, a study of score differentials in college basketball games found a high likelihood that point-shaving is rampant in the NCAA, but that may not be indicated by Las Vegas betting trends that only account for legal bets.[25] Similar trends appear to exist elsewhere where gambling is illegal and happens only underground. *See* Kevin Carpenter, *Match-Fixing—The Biggest Threat to Sport in the 21st Century?*, Sweet & Maxwell's Int'l Sports L. Rev., iss. 2, 2012 at 13, 19.

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sports/news/story?id=4146980; Sen. Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 Seton Hall J. Sport L. 5, 7 (1992).

23. Michael S. Schmidt & Howard Beck, *Donaghy Pleads Guilty in N.B.A. Betting Case*, N.Y. Times (Aug. 15, 2007), *available at* http://www.nytimes.com/2007/08/15/sports/basketball/15cnd-NBA.html.

24. Shaun Assael, *Portrait of a point shaver*, ESPN (Mar. 6, 2014), *available at* http://www.espn.com/mens-college-basketball/story/_/id/10624031/former-assistant-tj-brown-brandon-johnson-center-university-san-diego-point-shaving-scandal-espn-magazine.

25. *See* Pete Thamel, *Suspected Point-Shaving Scheme Shows Gambling Remains Persistent Issue*, N.Y. Times, April 1, 13, 2011, at B16, *available at* http://www.nytimes.com/2011/04/13/sports/ncaabasketball/13gamble.html; *see also* David Leonhardt, *Sad Suspicions About Scores in Basketball*, N.Y. Times (Mar. 7, 2006), *available at* http://www.nytimes.com/2006/03/08/business/08leonhardt.html.

These practices exist because of *illegal* gambling exists. When gambling is legal, sports gaming organizations and businesses, such as amici, operate as checks on the industry and are economically self-interested to reduce corruption; what good, after all, is offering legal gambling if the fix is in?[26] Europe has long provided a perfect example. Amici ESSA acts as its international betting integrity body. ESSA requires that its members keep records of all transactions and track data as part of an "early warning system" intended to detect unusual betting patterns and alert its members to trends and suspicious betting activity.[27] ESSA also works in partnership with gambling regulators, law enforcement authorities and sports bodies to share this information and punish match-fixing. Likewise, the United Kingdom mandates that sports bookmakers monitor for suspicious activity and provide relevant information to the UK's Gambling Commission, which maintains a Sports Betting Intelligence Unit dealing "with reports of betting-related corruption."[28] Indeed, the United Kingdom is home to the Sports Betting Integrity Forum (formerly the Tripartite Forum), which aims to coordinate "efforts in developing

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26. *See, e.g.*, Bill Wilson, *Sport bookmakers seek safety in numbers against cheating*, BBC News (Nov. 10, 2010), *available at* http://www.bbc.com/news/business-11692179.

27. *About ESSA*, ESSA: Sports Betting Integrity, *available at* http://www.eu-ssa.org/about-essa/ (last visited August 31, 2017).

28. *Sports Betting Intelligence Unit (SBIU)*, UK Gambling Commission, *available at* http://www.gamblingcommission.gov.uk/news-action-and-statistics/Match-fixing-and-sports-integrity/Sports-Betting-Intelligence-Unit.aspx (last visited Sept. 1, 2017).

Britain's Action Plan for protecting integrity in sport and sports betting."[29]

PASPA and its effects therefore run *counter* to Congress' intended purpose; the opposite of being "rationally related." As a result, PASPA cannot survive rational basis review and the Court should hold that the law is unconstitutional in its entirety.

C. PASPA is not rationally related to any federal legislative scheme regulating gambling.

PASPA also is wholly without any rational link to any other aspect of federal gambling legislation. The regulation of gambling and lotteries is "a matter of predominantly state concern." *Chun v. N.Y.*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992) (citation omitted); *see also Thomas v. Bible*, 694 F. Supp. 750, 760 (D. Nev. 1988) ("Licensed gaming is a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution."). Federal statutes have been enacted to address interstate or truly federal gambling issues and to assist states with the enforcement of their own laws. But PASPA stands alone as the only instance of federal regulation of wholly in-state gambling activity.

Unlike all other federal gambling laws, PASPA seeks to direct the content of state law by requiring that "no governmental entity . . . sponsor, operate, advertise, promote, license, or authorize by law or compact" any "lottery, sweepstakes, or other betting, gambling, or wagering scheme . . . on one or more competitive games

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29. *More on the Group*, Sports Betting Integrity Forum, *available at* http://www.sbif.uk/About-the-SBIF/More-on-the-Group.aspx (last visited Sept. 1, 2017).

in which amateur or professional athletes participate" 28 U.S.C. § 3702(2). Also unlike other federal gambling laws, there are no criminal remedies for violation of PASPA; instead, PASPA allows sports leagues to seek an injunction of any alleged violation of Section 3702. 28 U.S.C. § 3703. PASPA's outlier status carries with it constitutional and practical infirmities.

V. The Court Should Address the Important Constitutional Question of Whether PASPA Violates the Equal Sovereignty Doctrine.

PASPA has been a controversial piece of legislation from the moment it was enacted. Due in no small part to the grandfathering clauses, it burdens states in a way that not only lacks a connection to current conditions but also fails to accomplish the Act's purpose: to curb sports gambling in the United States. Since PASPA was enacted, legal sports gambling in Nevada has seen tremendous growth (including outside its border)—approximately $60.7 billion in legal wagers have been made in Nevada alone on football, basketball, and baseball.[30] This is to say nothing of the rise and spread of the illegal and unregulated sports gambling market.

The repeated challenges to PASPA—and New Jersey's attempts to pass sports gambling legislation—have only added to the questions surrounding the Act's constitutionality. In fact, the dissent in *Shelby County* questioned PASPA's continuing constitutionality in light of the equal sovereignty clause. 133 S. Ct. at 2649

30. David G. Schwartz, University of Nevada, Las Vegas: Center for Gaming Research, *Nevada Sports Betting Totals: 1984-2016* (2017).

(Ginsburg, J., dissenting) ("Federal statutes that treat States disparately are hardly novelties. *See, e.g.*, 28 U.S.C. § 3704 . . . . Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?" (citations omitted)). Shortly thereafter, Petitioners, relying on *Shelby County*, raised equal sovereignty arguments in their earlier 2013 appeal to the Third Circuit. *See Nat'l Collegiate Athletic Ass'n v. Gov. of New Jersey*, 730 F.3d 208, 237–40 (3d Cir. 2013).

All this has left states in an uncertain position with respect to their own potential sports gambling laws. As of June 27, 2017, for example, ten states in addition to New Jersey have enacted or are considering enacting sports gambling legislation.[31] In West Virginia, for example, the proposed legislation defiantly declares that "federal law prohibiting sports betting in West Virginia is unconstitutional." *Id.* It is no surprise that these states seek to enact sports gambling legislation. Congress long ago determined that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. § 3001(a)(1) (enacted in 1978). PASPA deviates from this historical federal policy and strips most states of their historical authority to regulate sports gambling.

Despite the principle that "[c]onstitutional issues are generally to be avoided," *Lambrix v. Singletary*, 520 U.S. 518, 524 (1997), the Court has noted that concerns for judicial economy may outweigh constitutional avoidance concerns, *id.* at 525. Those concerns are compelling here given PASPA's murky legislative history, failure to achieve

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31. Ryan Rodenberg, *Sports betting bill tracker*, ESPN (Jul. 26, 2017), *available at* http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states.

its objectives, and violation of the fundamental equal sovereignty doctrine.

Consequently, if the Court does not accept Petitioners' arguments in full, the Court should address the important issue of the equal sovereignty doctrine to provide clarity to States and to prevent future litigation about the legality of PASPA.

CONCLUSION

For the reasons discussed above, the Court should hold that PASPA violates the equal sovereignty doctrine, vacate the injunction, and reverse the decision below.

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GOVERNOR OF NEW JERSEY, et al.,

Petitioners,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION, et al.,

Respondents.

NEW JERSEY THOROUGHBRED
HORSEMEN'S ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* RESEARCHER JOHN T. HOLDEN IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus is a visiting scholar at Florida State University. He has a research focus on sports gambling policy and has published numerous law review and peer-reviewed articles addressing matters associated with sports gambling. He has a particular interest in the interaction between Federal and State gambling policies. As a researcher in the field, *Amicus* has a unique perspective on gambling policy and the historical relationship between the States and the Federal government in this area. *Amicus* has provided his institutional affiliation for identification purposes only, and implies no institutional endorsement.

SUMMARY OF ARGUMENT

The Third Circuit Court of Appeals' *en banc* interpretation of the Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701-3704 (PASPA), has impermissibly expanded the scope of Federal powers so as to prevent States from modifying or repealing their own statutes. Requiring the State of New Jersey

[1] Pursuant to Supreme Court Rule 37, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of *amicus curiae* briefs, in support of either party or of neither party.

to maintain its own provisions prohibiting sports gambling forces the State to employ their police powers to effectuate Federal policy. The commandeering of New Jersey's ability to repeal its own laws is incompatible with this Court's decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997).

The determination of the Third Circuit that the law which New Jersey passed in 2012, N.J. STAT. §§ 5:12A-1-5:12A-6, was rightfully preempted by PASPA and did not violate the anticommandeering doctrine raises meaningful questions about the rights of the States. *Nat'l Collegiate Athletic Ass'n v. Christie*, 730 F.3d 208 (3d Cir. 2013) (hereinafter "*Christie I*"). However, the Third Circuit's later *en banc* determination in 2016 that New Jersey was bound in perpetuity to maintain its ban on sports wagering with no ability to modify its statutes is beyond the scope of the Federal government's powers. *Nat'l Collegiate Athletic Ass'n v. Christie*, 832 F.3d 389 (3d Cir. 2016) (hereinafter "*Christie II*"). The Federal government cannot require a State to enforce its own laws. The powers of the States and Federal governments are separate and unequal, with the Federal government confined to enforce its own laws, without conscripting either state legislatures or state officers. *See Printz v. United States*, 521 U.S. 898, 935 (1997).

The Federal government is forbidden from forcing States to enact any law or requiring State officials to enforce Federal law within the officials' own State. *Printz*

v. United States, 521 U.S. 898, 912 (1997). The extension thereof is that the Federal government cannot utilize Federal law to prohibit States from repealing, in part or in whole, their existing regulations thereby commandeering the State legislative process. *See* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 103 (2015). The Federal government is able to utilize its law making and enforcement authority free from State-level interference; however, the Federal government cannot commandeer or dictate how States regulate private conduct. The Federal government has power to regulate conduct beyond impermissibly "seeking to control or influence the manner in which States regulate private parties." *Reno v. Condon*, 528 U.S. 141, 151 (2000).

Indeed, if the Federal government so desired, it could preempt the field of sports gambling and regulate it exactly as Congress so desires to the extent it implicates interstate commerce; however, that is not what PASPA does. There is no Federal regulatory regime for States to default to in the case of sports gambling, making this case distinct from this Court's prior anticommandeering cases. *See, e.g.*, *Fed. Energy Reg. Comm'n v. Mississippi*, 456 U.S. 742 (1982); *see also Hodel v. Va. Surface Min. & Reclamation Ass'n Inc.*, 452 U.S. 264 (1981). Indeed, as Circuit Judge Fuentes noted in dissent in *Christie II*, the majority's decision would seemingly allow New Jersey to initiate a full repeal only to begin immediately adding restrictions, such as requiring bettors to be 21 years old. The majority's decision distinguishes the act of repeal and

replace from partial repeal despite both reaching precisely the same conclusion. *See* Pet. App. 32a (Fuentes, J., dissenting) ("Suppose the State did exactly what the majority suggests it could have done: repeal completely its sports betting prohibitions. In that circumstance, sports betting could occur anywhere in the State and there would be no restrictions as to age, location, or whether a bettor could wager on games involving local teams. Would the State violate PASPA if it later enacted limited restrictions regarding age requirements and places where wagering could occur? Surely no conceivable reading of PASPA would preclude a state from restricting sports wagering in this scenario. Yet the 2014 Repeal comes to the same result.").

The Federal government has a limited number of ways to entice State cooperation with Federal objectives. For instance, the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, enables the Federal government to encourage states to comply with Federal programs through the awarding of funding for related projects. *See South Dakota v. Dole*, 483 U.S. 203 (1987). The Federal government could quite conceivably tie the awarding of public health funds to prohibiting sports gambling, but it does not. The Federal government has the ability to use various preemptive tools to displace inconsistent State law. PASPA could be weaponized to stop sports gambling, but this is not the case with New Jersey's 2014 repeal. In the case of the 2014 repeal, PASPA operates as a form of "illusory preemption," where at first glance it appears the statute may rightfully displace inconsistent State statutes, but because

New Jersey has repealed various sections of law, notably those that would be preempted, a conflict becomes impossible. As this Court has articulated, State law provisions that conflict with Federal law are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Perhaps the broadest means of preemption – field preemption – exists where "Congress creates a scheme of federal regulation so pervasive as to leave no room for supplementary state regulation." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 109 (1992) (Kennedy, J., concurring in part and concurring in the judgment). This is not the approach Congress has taken with respect to sports gambling.

Alternatively, Congress can expressly preempt State laws by indicating its intent to do so within the "statute's express language or through its structure and purpose." *Altria Grp., Inc. v. Good*, 129 S. Ct. 538, 540 (2008). However, PASPA contains no such provision indicating an intent to override statutes that were in existence prior to the statute's passage–only those arising following a one-year window after passage. *See* 28 U.S.C. § 3704(a)(3)(A). Finally, Federal law will prevail if State law is inconsistent with Federal law. *See Gibbons v. Ogden*, 22 U.S. 1 (1824). While the affirmative act by New Jersey to pass N.J. STAT. § 5:12A-1-5:12A-6 in 2012 may have been preempted due to a conflict with PASPA, the 2014 act of repealing and thus eliminating portions of existing State laws cannot conflict with PASPA (or any other Federal law) because it is as though those provisions of the State law do not exist. The only way PASPA preempts the New Jersey

law is through the creation of a special, previously unheard of "illusory preemption," whereby Federal law trumps non-existent State law provisions. Congress could enact a Federal sports gambling regime, and either task an existing agency such as the Commodities and Futures Trading Commission (CFTC) or the Federal Trade Commission (FTC) with oversight, or create a new Sports Gambling Regulatory Commission, but Congress has not done so. Instead, Congress has relied on the States to maintain their laws forever, and use State law enforcement officers acting as the administration mechanism for the Federal policy preferences in this area, without regard for the autonomy of the States to change their policy preferences.

The regulation of gambling activities in America has historically been a local and State matter. Gambling regulations date back to before the middle of the Eighteenth Century, with colonies and later States relying on gambling activities to raise revenue for the advancement of projects which served the local community. These funds have been used for such projects as founding Columbia University, as well as creating a base of funds for expansion at many of the country's other prestigious universities. HERBERT ASBURY, SUCKER'S PROGRESS: AN INFORMAL HISTORY OF GAMBLING IN AMERICA 72-74 (Thunder's Mouth Press 1938). The Federal statutory apparatus that implicates sports gambling is designed, with the exception of PASPA, to support States in the enforcement of their own laws. For instance, the Federal Wire Act requires a predicate violation of State law for the statute to be triggered. *See*

18 U.S.C. § 1084(b). A similar provision is found in the Illegal Gambling Business Act, one of the most powerful and widely applicable Federal statutes in this area, which requires "a violation of the law of a State or political subdivision in which it is conducted" for the statute to be triggered. 18 U.S.C. § 1955(b)(1)(i). More recently enacted statutes have continued to recognize the traditional place of States in regulating the indulgences of their population. The Unlawful Internet Gambling Enforcement Act contains a rule of construction stating that "[n]o provision of th[e] subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. § 5361(b). Even tangentially-related Federal statutes such as the Sports Bribery Act, which does not require gambling related activity to be implicated, notes Congress' intent to allow "local authorities," at minimum, equal jurisdiction over offenses. *See* 18 U.S.C. § 224(b). These example statutes leave PASPA's application to the New Jersey repeal as a Federal outlier, an outlier that champions a sort of "Faux Federalism," where Congress has neither provided a system for regulation nor used a recognized form of preemption to control the matter before this Court.

The Third Circuit's interpretation of PASPA in *Christie I* creates an unnecessarily broad classification of sports gambling that by default implicates Congress' ability to regulate interstate commerce. Some sports

gambling schemes undoubtedly implicate the Commerce Clause; for instance there is likely no dispute that Nevada's gambling industry has a substantial impact on interstate commerce and much of the State is supported by out-of-state tourism. The regulation of modern gambling infrastructure is far different (*e.g.*, geo-controlled online access) from the interstate transportation of lottery tickets, which this Court found to implicate the Constitution's Commerce Clause in 1903. *See Champion v. Ames*, 188 U.S. 321 (1903). The determination that sports gambling implicates the Commerce Clause by default is inconsistent with the Respondents' position articulated during oral argument at the Third Circuit. Specifically, that a repeal where individuals could wager up to $1,000 between friends and family would be the type of partial repeal of New Jersey law that would not implicate PASPA, with the implication being that the stakes were too small to trigger the Commerce Clause. Oral Argument at 35:15, *Christie II*, 832 F.3d 389 (3d Cir. 2016) (Nos. 14-4546, 14-4568, 14-4569). There is seemingly a degree to which sports gambling can exist and not implicate the Commerce Clause if Respondents are correct in their interpretation of the statute. The Third Circuit's overly broad interpretation of the reach of PASPA and the concession by Respondents that PASPA does not extend to all forms of sports gambling are indicative of PASPA's poor construction.

Indubitably, PASPA is a problematic statute. PASPA requires the States to utilize their police powers to enforce Federal policy and prohibits State legislatures

from exercising their constitutionally protected autonomy. The Federal commandeering of New Jersey's legislative process is being puppeteered through an illusory regulatory scheme that lacks a truly preemptive affect. PASPA's authorization of Federal and private intrusion into the State legislative process is an affront to years of federally recognized State autonomy in the regulation and classification of gaming activities. PASPA also categorizes broad categories of activities as within the regulatory scope of the Commerce Clause despite the States' ability to confine many schemes to an intrastate framework.

ARGUMENT

I. The Professional and Amateur Sports Protection Act Impermissibly Commandeers State Police Powers

The dual sovereignty system established by the Constitution was designed to create a Federal government of limited powers, with substantial authority reserved for the States. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). As Madison articulated, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." THE FEDERALIST NO. 45, 227 (Madison) (Dover Thrift ed. 2014). Madison would elaborate that the dual sovereignty system creates "a double security" for the rights of the people, with both the Federal and State governments serving as a check on one another.

See THE FEDERALIST NO. 51, 255 (Madison) (Dover Thrift ed. 2014). The separation of powers between the State governments and the Federal government is essential to the constitutionally proper functioning of the nation. PASPA's application against New Jersey's repeal of portions of its law offends this historical separation. The Respondents, acting under authority of the Federal government, abscond with New Jersey's sovereign right to regulate their citizenry in the absence of lawful Federal authority. *See* 28 U.S.C. § 3703.

The Tenth Amendment does not allow the Federal government to dictate how States are to govern their citizens. In *New York v. United States*, this Court stated that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." 505 U.S. 144, 162 (1992) (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)). Relatedly, this Court has held "that state legislatures are not subject to federal direction." *Printz v. United States*, 521 U.S. 898, 912 (1997) (emphasis omitted) (citing *New York*, 505 U.S. 144). State governments are free to pass laws criminalizing conduct, as they are also free to remove their laws from the books and remove criminal penalties. The Federal government cannot require that a State continue to enforce a State law that is no longer desired by the State yet is in line with Federal policy preferences; however, that is the very essence of what is taking place in this case. The Respondents, who have shared enforcement authority under PASPA with the Attorney General of the United States, are attempting to hijack the State legislative

powers of New Jersey to maintain a policy that serves their private needs rather than the citizens of New Jersey.

Prior to its passage, PASPA raised Federalism concerns. W. Lee Rawls, Assistant Attorney General, noted that how States generate revenue is a matter that has historically been outside the purview of the Federal government, and the proposed statute "raises federalism issues," relating to incursions into roles typically played by the States. *See* Letter from W. Lee Rawls, Assistant Attorney General, Department of Justice, to the Honorable Joseph W. Biden, Jr., Chairman, Committee on the Judiciary (Sept. 24, 1991). The concern over PASPA's abridgement of States' rights was highlighted in the Senate Report prepared in association with the statute. Senator Grassley stated that the argument that sports wagering was somehow distinct from other State-level revenue generating wagering programs was misguided, and "this legislation would set the dangerous precedent that the Federal government can prohibit any State revenue raising program, under the guise of 'interstate commerce,' at the behest of any special interest." S. REP. NO. 102-248, at 12 (1991). Senator DeConcini acknowledged that opponents of the bill he then championed had argued that the proposed legislation intruded on the rights of States to raise revenue. Senator DeConcini would state "[t]he answer to State budgetary problems should not be to increase the number of lottery players or sports bettors, regardless of the worthiness of the cause." *See* 138 CONG. REC. 12973 (June 2, 1992) (Sen. DeConcini). While the

Senator from Arizona may very well have an informed opinion as to the revenue-generating worthiness of State-sponsored sports lotteries it does not diminish the fact that these are matters left for State legislators to decide. The Federal intrusion into the sovereign domain of the New Jersey legislature, after the passage of New Jersey's 2012 Sports Wagering Law, indicated a new interpretation of this Court's anticommandeering precedent; however, the 2014 repeal of portions of New Jersey's wagering laws that the Third Circuit has held inconsistent with PASPA is a vast expansion of Federal power incompatible with this Court's prior jurisprudence. As a result of the 2014 repeal there is no Supremacy Clause issue, because PASPA's ability to conflict with repealed statutory provisions is wholly illusory.

The Federal government is free to regulate interstate commerce with broad authority. It is also free to prohibit sports gambling to the extent sports gambling implicates interstate commerce. The State of New Jersey is able to pass laws affecting sports gambling within the State, provided those laws are consistent with Federal law. Likewise, the New Jersey legislature is free to repeal its laws regulating sports gambling. New Jersey's repeal of its laws regulating sports gambling does not preclude the Federal government from passing its own laws to supplement the now absent State laws. The Federal government cannot require New Jersey to maintain and enforce its laws simply because they are amenable to Federal policy preferences. As Judge Kozinski of the Ninth Circuit noted in

a case involving medical marijuana laws in the State of California: "That patients may be more likely to violate Federal law if the additional deterrent of state liability is removed may worry the Federal government, but the proper response – according to *New York* and *Printz* – is to ratchet up the federal regulatory regime, *not* to commandeer that of the state." *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) (emphasis in original).

Congress has many avenues to encourage States to cooperate with their objectives. For instance, this Court has noted that Congress can direct Executive agencies to withhold a portion of related funds from the States in order to encourage States to pass laws in accordance with Congress' policy preferences. *See South Dakota v. Dole*, 483 U.S. 205 (1987). Indeed, the scheme that Congress devised in *New York* included numerous incentives for States to participate in the Federal nuclear waste disposal program. *See New York*, 505 U.S. 152-54 (1992). Nonetheless, the *New York* scheme failed to pass constitutional muster because of how it commandeered State legislatures to regulate according to Federal desires. In *Hodel*, this Court observed the absence of commandeering, in regards to a program where States were able to participate in a Federal regulatory program or propose their own program. *See Hodel v. Surface Mining & Reclamation Ass'n Inc.*, 452 U.S. 264 (1981). The *Hodel* regulatory choice meant that "[i]f a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory

burden will be borne by the Federal Government." *Id.* at 288. The Third Circuit's interpretation of anticommandeering precedent cannot be reconciled with this Court's holdings. There is no Federal regulatory program that New Jersey can opt to enter should it choose to repeal its gambling laws. Unlike the scenario in *Hodel*, if New Jersey repeals its laws governing sports gambling, the Federal government cannot begin prosecuting individuals (or corporate entities) in New Jersey for violating Federal laws *because there are none*. The Federal government lacks the ability to step in where New Jersey chooses not to enforce their criminal laws affecting sports gambling. The Federal government's "ban on sports wagering" is entirely cobbled together by predicate offenses based in State law.

The freezing of New Jersey's legislative powers is inconsistent with the power that the Federal government possesses. In *Printz*, this Court held that the Federal government could not use State law enforcement in order to execute a Federal prerogative to perform background checks on those wishing to purchase firearms. *See Printz v. United States*, 521 U.S. 898 (1997). "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* at 935 (1997). The requirement that New Jersey maintain any portion of its sports gambling laws, and conceivably enforce those laws is wholly inconsistent with *Printz* because PASPA

as a civil statute relies on State law and State law enforcement to maintain criminal provisions to enforce Federal policy.

The failure of Congress to provide New Jersey with a choice "of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation," is inconsistent with the anticommandeering doctrine. *See New York*, 505 U.S. at 167 (1992) (citing *Hodel*, 452 U.S. at 288). A similar choice was the focus of *Fed. Energy Reg. Comm'n v. Mississippi*, 456 U.S. 742, 749-50 (1982) (asking States to give consideration to Federal regulatory standards, but not requiring States to adopt those standards), but there is no such choice presented to the state of New Jersey, since there is no Federal enforcement framework that New Jersey can adopt. There is only the command that the legislature may not "sponsor, operate, advertise, promote, license, or authorize by law or compact . . . " a sports wagering scheme. 28 U.S.C. § 3702(1). As was noted by the Ninth Circuit, "preventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). PASPA has been utilized by the Respondents to circumvent the sovereignty of New Jersey's legislature and dictate the preferences of the Federal government to the citizens of New Jersey.

The Federal government is constitutionally restrained from commandeering State legislatures to

execute Federal policy preferences by the Tenth Amendment. The Federal government may not dictate to State legislatures which laws to enact, nor may they prohibit State legislatures from repealing their laws. Despite these restraints on Federal power, the Federal government has the authority to use various means to supplant State legislation that is incompatible with its own agenda. While PASPA cannot require States to take any affirmative steps to enact legislation, by handcuffing States from partially repealing their legislation the Third Circuit has vastly expanded the scope of Federal power.

A. The Professional and Amateur Sports Protection Act Does Not Fall Within Any Recognized Category of Preemption

While the Federal government can, and does frequently exercise its ability to preempt State law that is inconsistent with its goals, PASPA does not preempt New Jersey's repeal. PASPA creates the illusion that it has preemptive effect, but in actuality the statute does not exist within any of the categories of preemption or within quasi-accepted preemption doctrines. The Federal government may not force State legislatures to pass legislation, nor can it require State officials to enforce Federal statutes that regulate private individuals. *See Reno v. Condon*, 528 U.S. 141, 151 (2000). Congress can, however, preempt statutes and whole areas of regulation which interfere with the achievement of Federal objectives. Preemption may in fact be the most used and substantial power of the Federal government.

See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000).

PASPA does not contain a clause expressly preempting inconsistent State statutes. *See* 28 U.S.C. §§ 3701-3704. In *Cipollone*, this Court articulated the need to construe provisions "in light of the presumption against the pre-emption of state police power regulations." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992). In *Medtronic v. Lohr*, it was noted that the approach of a presumption against preemption "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." 518 U.S. 470, 485 (1996). Instead, PASPA created a convoluted grandfathering scheme allowing a hodgepodge of State gambling schemes to exist, which Justice Stevens noted that some of the exemptions were derived from "obscured congressional purposes." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 179 (1999). PASPA does not contain a clause expressly preempting State statutes that are inconsistent. Not even a broad reading of PASPA could be interpreted to expressly preempt State law. PASPA commands those non-exempted States, by the various exemptions in section 3704, to not commit one of the six PASPA sins (sponsor, operate, advertise, promote, license, or authorize), *see* 28 U.S.C. § 3702, but is silent as to any intended express preemptive effect. The absence of an express preemptive effect from Congress must be read narrowly to conclude that PASPA does not preempt State law by any expression of intent. *See Cipollone*, 505 U.S. at 518; *see also Altria Grp. v.*

Good, 129 S. Ct. 538, 540 (2008) ("When the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'").

Absent an express preemption clause within a statute indicating the intent of Congress to supplant inconsistent State statutes, the Federal government can effectuate its power by occupying the field in which it seeks to regulate. The Federal government may also pass a statute so all-encompassing that it is intended to occupy the entire field. In fields which Congress intends to occupy exclusively, this intent can be inferred from the "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Congress has not occupied the field of sports gambling. Instead, the Federal government has played an ancillary role with deference paid to individual State preferences. Indeed, much of the modern Federal statutory apparatus that supports the broad prohibition on sports wagering indicates that Federal legislation is supportive and deferential to State legislation. The Wire Act's Senate Report noted "[t]he purpose of this legislation is to assist the various States, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling." S. REP. 87-588, at 3 (1961). Similarly, the Illegal Gambling Business Act and other acts

passed as part of the omnibus Organized Crime Control Act of 1970 requires a violation of State law in order for the statute to be triggered. *See* 18 U.S.C. § 1955(b)(1)(i). Without the predicate violation of State gambling law, the Illegal Gambling Business Act has no effect. The idea that Federal law is deferential to State preferences for the activities the State deems permissible is also found in the most recent Federal statute that directly implicates sports wagering. The Unlawful Internet Gambling Enforcement Act of 2006 contains a rule of construction which states: "No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. § 5361(b). PASPA is alone in its requirements that State governments refrain from committing the six "sins." In fact, PASPA is the sole statute to directly implicate State regulation of sports gambling that does not articulate that State law leads in the realm of sports gambling while Federal law acts as a means to supplement the State.

The third of the major potential means for finding a preemptive effect of PASPA on State regulation is if there is conflict preemption. Obviously, if PASPA contains a provision that is inconsistent with New Jersey State law and PASPA is found to be a valid exercise of Congressional power, then PASPA would prevail. Similarly, if a New Jersey statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," that statute would be

preempted. *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). There may be an argument that the 2012 Sports Gambling statute passed by New Jersey was preempted by PASPA. However, now there can be no conflict. It is an impossibility for a Federal law to present a conflict with a provision that no longer exists. *Black's Law Dictionary* defines repeal as "[a]brogation of an existing law by express legislative act." *Repeal*, BLACK'S LAW DICTIONARY (10th ed. 2014). The act of repeal annuls the previous provisions as though they were never present eliminating the mere possibility that Federal law could conflict with the absence of an offending provision. There is no impossibility of compliance with both Federal and State law in the matter presently before this Court because the Federal law requires that States not do something, and through repeal the State of New Jersey has not committed one of PASPA's enumerated sins.

PASPA's place in the Federal statutory landscape is uncertain. Counsel for the United States has expressed confusion and uncertainty over how PASPA interacts with State statutes. In response to a question at Oral Argument about whether PASPA was preemptive, counsel for the United States responded: "Technically I don't know the answer to that question." Transcript of Oral Argument at 56, *Christie I*, 730 F.3d 208 (3d Cir. 2013) (Nos. 13-1713, 13-1714 & 13-1715). Despite the uncertainty expressed by counsel for the United States in *Christie I*, the Third Circuit in *Christie II* articulated that "States may not use clever

drafting or mandatory construction provisions to escape the supremacy of Federal law." Pet. App. 63a. The Federal government cannot similarly rely on State legislatures to maintain and enforce provisions that no longer serve the will of the State's citizens.

In *Christie I* the United States stated that New Jersey could repeal "in whole or in part" its sports betting prohibitions. Br. for the United States in Opp'n at 11, *Christie v. Nat'l Collegiate Athletic Ass'n*, 730 F.3d 208 (3d Cir. 2013) (Nos. 13-967, 13-979, & 13-980). That position was rejected by the Third Circuit in *Christie II* when it was determined that New Jersey's repeal was synonymous with authorizing sports gambling. That position is untenable. The freedom of State governments to repeal their own legislation is substantial. That being said, if the Federal government disagrees with the fact that New Jersey's repeal of its own laws renders State law inconsistent with Federal objectives, then to the extent the Commerce Clause allows, Congress can enact their own sports gambling laws that act as a prohibition. Indeed, this approach has been advocated by one of the Respondents, who called for a "federal framework." *See* Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES, Nov. 13, 2014, http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?mcubz=0. Regardless of the social desirability of sports gambling, the Federal government has means by which it can stop such behavior and has not exercised them. Rather it has allowed PASPA to exist as a statute that gives the illusion of preemption without the

Federal government having to pay the political cost of removing revenue generating power from the States.

The interpretation that PASPA preempts New Jersey's ability to repeal its own laws creates a slippery slope. State level repeal of marijuana laws, and even "sanctuary cities," that have declined to provide aid or assistance to the Federal government in the enforcement of some Federal immigration laws are two relevant examples. PASPA raises a similar question as those faced by States which grappled with the legalization (or decriminalization) of both medical and recreational possession and sale of marijuana. A growing number of States have indicated a desire to discontinue the costly campaign of policing users of small amounts of marijuana.[2] Similarly, governments see little utility in maintaining and enforcing State laws against sports wagering. The question is to what extent do the States have to participate with Federal law enforcement and continue aiding with the achievement of Federal policy goals? *See* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 8 (2013). The Controlled Substances Act, in contrast to PASPA, explicitly states that the statute preempts State law to the extent "the two [laws] cannot consistently stand together." 21 U.S.C. § 903.

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[2] Unlike PASPA, which has no Federal criminal law implications and therefore does not implicate Federal law enforcement agencies, the Controlled Substances Act is connected to an extensive Federal law enforcement scheme via criminal penalties contained within Title 21 of the U.S. Code. *See, e.g.*, 21 U.S.C. § 841(b)(1)(B).

In the case of marijuana regulation, the Federal government would have had to carry the burden left by States who removed State and local barriers resulting in the responsibility for approximately 99% of all marijuana arrests. Mikos, 16 J. HEALTH CARE L. & POL'Y at 17. In the case of State legalization of sports gambling, the Federal government would lose an even greater share of their ability to enforce their policy wishes, because PASPA is not a criminal statute and the other relevant criminal statutes (*e.g.*, 18 U.S.C. §§ 1084, 1955) rely on State law violations. This leaves only State law to provide any substance to the Federal desires that sports betting be largely confined to Nevada. This burden should not be carried by the States. If the Federal government deems sports gambling or any other vice issue implicating their Commerce Clause powers to be a problem of "national concern" then they are able to implement and enforce their own policy. The Federal government cannot, however, force States to implement or maintain their own policies to achieve Federal objectives. The argument that New Jersey's 2014 repeal should be preempted by PASPA, and similarly that State marijuana repeals, legalizations and decriminalizations should be preempted because they obstruct Federal policy, leads to a result whereby States are required to enforce policy that is not only costly, but also inconsistent with the values of the citizens in many cases who voted for legalization. *See* Robert A. Mikos, *On The Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1474

(2009). Yet PASPA, via the Third Circuit's *en banc* opinion, is of even greater offense to preemption jurisprudence because there is no Federal law enforcement attachment. Therefore, the States must continue to enforce their sports gambling statutes using State law enforcement officers, who are paid from State budgets.

PASPA, as interpreted by the Third Circuit, is an unprecedented restraint on State sovereignty. Despite the fact that the State of New Jersey's citizens have articulated that a sports gambling prohibition is no longer desirable, the Respondents remain committed to their contention that PASPA should remain. At the same time, one has taken to lobbying in the *New York Times* for a Federal framework to regulate the practice. PASPA contains no provision that would give weight to the Third Circuit's preemptive finding in light of New Jersey's 2014 repeal. While the Third Circuit stated "[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention of a particular word." Pet. App. 16a (citing *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 382-83 (1990)). The contention that the Supremacy Clause is so strong that Federal legislation can overcome poor drafting and an ambiguous preemptive effect to usurp State legislative power is equally offensive to the Constitution and the historical role that States have played in regulating the private conduct of their citizens.

B. The Regulation of Sports Gambling is a Matter that Has Historically Been Left to the States

America's reliance on gambling has been often overlooked in modern conversation. America was built on gambling and those decisions were executed by the States. The Jamestown settlement was funded through a lottery more than 150 years before the ratification of the Constitution. Jerome H. Skolnick, *The Social Transformation of Vice*, 51 L. & CONTEMP. PROBLEMS 9, 16 (1988). The reliance on gambling, particularly lotteries, was indispensable to the development of both public and private projects during early American history, with portions of the Revolutionary War having been financed through local lotteries. Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 12 (1992). During the pre-revolutionary war period, the prominence of lotteries was largely determined by local sensibilities; for instance, in "Pennsylvania, where the Quakers had political power, [the Quakers] regulated lotteries more heavily than other states." *Id.* at 27. These "State-conducted lotteries prospered into the early years of the nineteenth century and played an important role in the westward expansion of the nation." *Id.* at 31. While State and local lotteries have played an important role in funding the development of many of the country's premier educational institutions, they also funded western exploration.

Even though lotteries enabled exploration of many of the western States, several of these States elected to explicitly ban lotteries in their new Constitutions. *See* I. N. Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 JEFFREY S. MOORAD SPORTS L.J. 361, 369 (2010). As lotteries began to fall out of favor, States had the primary responsibility for regulating their prohibitions through the middle portion of the Nineteenth Century. *Id.* Other gambling activities during this era were also left to State legislatures to regulate (or more commonly, not regulate). *Id.* at 370. It was not until the lotteries began to impact more States than those where they had originated, that the Federal government passed a law in 1890, banning the use of the mail for distribution of lottery materials. Act of Sept. 19, 1890, ch. 908, § 1, 26 Stat. 465. It was the lack of the States' ability to constrain the activity within their borders that necessitated the Federal intervention. 18 U.S.C. § 1301. Similarly, when lottery operators began circumventing the use of the mail by using private couriers and holding lotteries at sea, Congress used its powers under the Commerce Clause to target the lottery operators who sought to evade the ban on the use of the mails. *Id.* at 374. This controversial use of the Commerce Clause was upheld by this Court in *Champion v. Ames*, 188 U.S. 321 (1903), and *Francis v. United States*, 188 U.S. 375 (1903), otherwise known as the "*Lottery Cases*." Two years later this Court stated that "[t]he suppression of gambling is concededly within the police powers of a State, and legislation prohibiting it, or acts which may tend to or facilitate it, will

not be interfered with by the court unless such legislation be a 'clear, unmistakable infringement of rights secured by the fundamental law.'" *Ah Sin v. Wittman*, 198 U.S. 500, 505-06 (1905) (citing *Booth v. Illinois* 184 U.S. 425, 429 (1902)).

In 1931, Nevada re-authorized casino gambling, setting the stage for more than 20 other States to begin operating and regulating racetracks and pari-mutuel betting facilities. I. N. Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 JEFFREY S. MOORAD SPORTS L.J. 361, 374 (2010). The Twentieth Century approach to regulation of gaming activities has been largely the same as the approach taken in previous eras. The States define which activities are permissible and the Federal government has periodically passed legislation to assist the States where activity extends into areas beyond the reach of the States. For instance, prior to passage of the Wire Act in 1961, then-Attorney General Robert F. Kennedy testified that the legislation was necessary to address the very specific problem of targeting the funds that allow "gambling" kingpins to live outside the jurisdiction of State law enforcement officials and remain beyond the reach of State law. *Legislation Relating to Organized Crime Hearings on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039 Before Subcommittee No. 5 of the Committee of the Judiciary*, 87th Cong. at 22 (1961) (statement of Robert F. Kennedy). The Wire Act's Senate Report similarly notes the States' primary role in enforcement of relevant law, articulating the

purpose of the statute is "to assist the several States in the enforcement of their laws pertaining to gambling and to aid in the suppression of organized gambling activities. . . ." S. REP. 87-588, at 2 (1961). Additionally, the statutory text itself acknowledges that the Wire Act provides safe harbor for transmissions between States (or foreign jurisdictions) where the implicated activity is legal. *See* 18 U.S.C. § 1084(b).

The Illegal Gambling Business Act, passed as part of the omnibus Organized Crime Control Act of 1970, requires a predicate violation of State law effectively limiting the role of Federal agencies to one of supporting State law enforcement. *See* 18 U.S.C. § 1955(b)(1)(i). Similarly, the Interstate Horseracing Act contains the congressional finding that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. § 3001(a)(1). In addition to acknowledging the primary role of the States, the statute also includes the congressional finding that the Federal government should act to prevent one State from interfering with the gambling policies of another. 15 U.S.C. § 3001(a)(2). Despite these historic findings, PASPA has emerged as an anomaly, an isolated statute that seemingly ignores decades of Federal policy yet is sufficiently aware of certain State reliance interests so as to not abridge them. Efforts were made to pass new legislation that would ban wagering on amateur sporting events and create a new criminal offense in 2001. Even with this proposed new law, the Congressional Budget Office acknowledged that much of the cost burden would be

borne by State law enforcement. *See* S. REP. 107-16, at 7 (2001). Though the *Amateur Sports Integrity Act* did not become law, the next directly relevant statute to sports gambling, the *Unlawful Internet Gambling Enforcement Act*, also acknowledged the primacy of State law and the supporting role of Federal legislation. The statute passed in 2006, notes "[n]o provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. § 5361 (b). Despite the history of gambling policy in the United States that extends to prior to the unification of the States, the Federal government could regulate the field of sports gambling or make sports betting a Federal criminal offense; however, they have not done so. PASPA does not criminalize sports betting, PASPA does not preempt the field of sports gambling, PASPA does not expressly preempt any statute, and PASPA cannot preempt the 2014 New Jersey repeal because it is an impossibility for PASPA (or any other statute) to conflict with something that does not exist.

II. Sports Gambling Should Not Automatically Implicate the Commerce Clause

Congress has an undisputed ability to regulate interstate commerce, and some sports gambling schemes implicate interstate commerce. But as Justice O'Connor noted in her dissent in *Gonzales v. Raich*: "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility

that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (citing *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting)). In the case of sports betting, that courageous state appears to have been Nevada, who most certainly built a gambling empire on the back of interstate commerce. Yet, contrary to the holding of the District Court in 2013, not all modern sports gambling schemes meet the congressional findings that served as the basis of the New Jersey District Court's holding. *See Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551, 558-60 (D.N.J. 2013).

The four-factor test applied in *United States v. Lopez*, 514 U.S. 549, 559-67 (1995) and *Morrison v. United States*, 529 U.S. 598, 609-13 (2000) raises questions about some sports gambling schemes that are seemingly implicated under PASPA. The first factor is whether the statute in question regulates economic activity that "substantially affects interstate commerce." *Id.* at 610. PASPA is unattached to a Federal regulatory scheme, because the ancillary statutes that are often cited as related to PASPA rely on individual State regulations to sustain their existence. While some State sports gambling schemes would most certainly impact interstate commerce, the Respondents have suggested that not all schemes would offend their interpretation of PASPA. Oral Argument at 35:15, *Christie II*, 832 F.3d 389 (Nos. 14-4546, 14-4568 & 14-4569).

The second factor established in *Lopez* and applied in *Morrison* asked whether the statutes contained an express jurisdictional statement, reflecting Congress' intent to regulate interstate commerce. *Morrison*, 529 U.S. at 611-12. PASPA contains no express jurisdictional statement establishing its connection to interstate commerce. The third factor, under the *Lopez* and *Morrison* test, is an examination of the legislative history of the statute to determine whether the statute's legislative history contained findings regarding the impact on interstate commerce. *Id.* at 612. While PASPA does contain articulations from Congress that sports gambling may implicate interstate commerce, many of the Congressional findings now appear to no longer support the need for PASPA. For instance, the District Court cited the congressional finding that "[t]he spread of legalized sports gambling would change forever – and for the worse – what [professional and amateur sports] games stand for and the way they are perceived." *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551, 558 (D.N.J. 2013). Interestingly, now one of the Respondents has advocated for the advantages of legalized sports betting. *See* Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES, Nov. 13, 2014, http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?mcubz=0. Similarly, it is unclear as to how compelling "the interstate ramifications of sports betting . . . for federal legislation," remain given the rampant spread of so-called daily fantasy sports, which have not been the subject of a single PASPA injunction. *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d

551, 559 (D.N.J. 2013). Additionally, within PASPA's legislative history are minority views expressed by Senator Grassley who stated: "The majority also attempts to establish that this legislation is consistent with existing Federal law. Nothing could be further from the truth. The Federal Government has never sought to regulate purely intrastate wagering activities." S. REP. 102-248, at 12 (1991). Finally, the fourth factor calls for an examination of whether certain sports betting schemes "may affect the national economy." *Gonzales v. Raich*, 545 U.S. 1, 45 (2005). In *Lopez*, it was observed that the connection between gun possession and interstate commerce "was attenuated." *Morrison*, 529 U.S. at 612 (citing *Lopez* 514 U.S. at 563-67). The argument that sports gambling leads to organized crime and other problems of national importance may have some validity, but like this Court's observation in *Morrison* such arguments associated with "costs of crime" and "national productivity" used to justify Commerce Clause legislation may lead to Congress having the ability to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Morrison*, 529 U.S. at 613 (citing *Lopez* 514 U.S. at 564). Similar to the legislation challenged in *Lopez*, PASPA creates an expansion of Federal power that intrudes into activities that can have little impact on interstate commerce.

This Court has held that gambling does not implicate a constitutionally protected right and is often banned all together, *United States v. Edge Broad. Co.*,

509 U.S. 418, 426 (1993), but that is not what has occurred here. Instead, Congress has determined that while sports gambling may implicate the Commerce Clause, the national concern is not of sufficient merit to abridge the rights of at least ten states to offer some form of sports betting activity. *See* Ryan M. Rodenberg & John T. Holden, *Sports Betting Has An Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 16 (2017). The dissenting views of Senator Grassley, memorialized in the Senate Report, note the slippery slope of couching PASPA as a valid exercise of Commerce Clause legislation: "this legislation would set the dangerous precedent that the Federal Government can prohibit any State revenue raising program, under the guise of 'interstate commerce,' at the behest of any special interest." S. REP. 102-248, at 12 (1991). Not all sports gambling schemes are likely to implicate the Commerce Clause, as the Respondents themselves have articulated that a so-called "friends and family plan" of sports betting where bets of up to $1,000 may not offend PASPA. Oral Argument at 35:15, *Christie II*, 832 F.3d 389 (Nos. 14-4546, 14-4568 & 14-4569). This proposal by Respondents' counsel begs the question: Why do PASPA's restrictions not reach the "friends and family plan," but the state-sanctioned plan does? *See* 28 U.S.C. § 3702(1)-(2). It is an odd situation where certain conduct between private parties does not seemingly trigger the reach of the Commerce Clause, but the State performing the same function does.

CONCLUSION

PASPA raises serious Federalism concerns; this fact was true in 1991 and remains true today. *See* Letter from W. Lee Rawls, Assistant Attorney General, Department of Justice, to the Honorable Joseph W. Biden, Jr., Chairman, Committee on the Judiciary (Sept. 24, 1991). While on the surface PASPA appears to be part of a Federal regulatory apparatus because of the existence of other statutes implicated by gambling activities, upon closer examination all the statutes rely on the primacy of State law. This reliance on State law in conjunction with a lack of preemptive intent through express means, renders PASPA's preemptive effect largely illusory, and in the context of New Jersey's repeal of portions of their own laws PASPA's preemptive effect is non-existent. There is no longer a statutory provision to trigger a conflict.

While the Supremacy Clause acknowledges the paramountcy of Federal law, the compromise of the Constitution's framers was to provide expansive powers to the States, while the Federal government maintained a narrow sphere of oversight. *See* U.S. CONST. art. VI, cl. 2; *see also Printz*, 521 U.S. 898, 918-22 (1997). PASPA, as applied to the factual scenario of New Jersey's statutory repeal, is such that it is wholly incompatible with this Court's anticommandeering jurisprudence. PASPA does not offer States the opportunity to regulate sports gambling or have the Federal government regulate and enforce the practice. Instead, PASPA requires States not to pass new regulations or

modify existing regulations while they continue to enforce, at their own expense, the provisions their citizens decried overwhelmingly that they did not want. *See* Pet. App. 27a. PASPA forces Federal policy decisions and differentiations on the citizens of the States; this has a potential immense trickle-down effect on States that have articulated different views from a wide variety of policy concerns including those who regulated marijuana in contravention of the Controlled Substances Act.

Beyond PASPA's affront to State sovereignty and the autonomy of State legislators and law enforcement officials in direct violation of *Printz* and *New York*, PASPA as interpreted is a moving target for when the statute is implicated. The ideas that formed the foundation for Congress to conclude that regulating sports gambling was addressing a "national concern" have changed. Similarly, the types of activities that once implicated by default interstate commerce can now be confined to the borders of individual States, and in the case of a wide-spread sports gambling product endorsed by a majority of the Respondents, these geographic restrictions have been quite successful. While some sports gambling activities can conceivably implicate interstate commerce, given the tight controls of other State-regulated gambling activities, this should not be the default position.

For these reasons, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the fifty States, three Territories, and two Commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been docketed.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

State and local governments have broad responsibilities for regulating private conduct within their respective jurisdictions. That responsibility includes repealing and modifying laws over time as additional information becomes known and as the views of citizens evolve and change. State and local officials are responsible to the citizens who elected them for the decisions they make regarding how to regulate private conduct.

The decision below permits Congress, in effect, to freeze state and local laws and regulations in place, in areas of law in which Congress has not preempted the field by enacting its own rules. By doing so, Congress creates the false and misleading impression that state and local officials are responsible and should be held accountable for policy choices over which those officials have no real

control. Accordingly, this Court's decision will have a substantial impact on the rights and responsibilities of state and local governments to regulate conduct within their jurisdictions.

SUMMARY OF ARGUMENT

As construed by the Third Circuit, the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701, violates the Tenth Amendment. According to the Third Circuit, PASPA prevents states not only from legislating to affirmatively "authorize" sports wagering, but also from modifying or repealing existing state restrictions on sports wagering.

In reaching this result, the Third Circuit attempted, but failed, in two rounds of decisions, to delineate in a manner consistent with the Tenth Amendment exactly what states can and cannot do to regulate sports wagering under PASPA. *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey ("Christie I")*, 730 F.3d 208 (3d Cir. 2013); *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey ("Christie II")*, 832 F.3d 389 (3d Cir. 2016). In *Christie I*, the panel decision reasoned that PASPA would allow repeal of existing bans on sports wagering. In *Christie II*, however, the *en banc* Third Circuit reversed course, holding that, while full repeal of sports wagering bans might be permissible under the statute, the partial repeal enacted by New Jersey is not.

The Third Circuit's opinion leaves states with only two options: maintain and freeze in place bans they had in place when PASPA was enacted a quarter century ago in 1992, or completely repeal existing bans, allowing

unfettered and totally unregulated sports wagering. That is no choice at all, as permitting totally unregulated sports wagering is not a viable (or responsible) alternative.

Moreover, the Third Circuit's suggestion that there *might* be a third option because some "de minimis" partial repeals of existing bans *might* pass muster cannot be squared with the rationale of its ruling that New Jersey's partial repeal at issue here violates PASPA. In any event, this third option, if it exists at all, is so narrow that it applies only to trivial changes, such as permitting social betting among friends and family. It does not give states any meaningful opportunity to shape the substance of state law in accordance with the considered judgment of state officials regarding the competing concerns presented.

Thus, in the real world, PASPA gives states only one option: freeze state law as it existed in 1992, with no meaningful ability to modify it by repeal or otherwise. By doing so, Congress has impermissibly commandeered state law. Congress cannot, on the one hand, fail to preempt the field by way of enacting a federal regime for the regulation of sports wagering and, on the other hand, prevent states from taking any meaningful action to revise their laws to reflect constituent opinion. To allow as much would be to thwart fundamental principles of democracy under which legislators are held accountable for the policy choices they actually make—not for outdated or ineffective policies they are prohibited by Congress from changing.

The practical implications of the decision below extend well beyond sports wagering, an important topic of considerable concern to state and local governments

by itself. The rationale of the Third Circuit's decision upholding its reading of PASPA would permit Congress to order state and local governments to freeze state and local law not just on sports wagering, but also on other issues of critical importance to state and local governments and their constituents, notwithstanding the absence of any comprehensive federal regulation on the topic. Examples include medical use of narcotics, physician-assisted death for the terminally ill, drug misuse and substance abuse during pregnancy, and self-driving cars. Accordingly, the court of appeals' decision should be reversed.

ARGUMENT

I. This Court should hold that PASPA, as read by the Third Circuit, violates the Tenth Amendment because it prevents New Jersey from modifying or repealing existing state restrictions on sports wagering in the absence of any federal regime for the regulation of sports wagering.

A. The Third Circuit's reading of PASPA effectively requires states to freeze prohibitions on sports wagering they had in place in 1992. Full repeal of all regulations is not a viable alternative, and the Third Circuit's decision gives states the ability (at most) to make trivial and essentially meaningless changes by way of a partial repeal.

Congress is empowered to prohibit sports wagering and thereby to preempt contrary state law, but it has declined to do so. In that regard, PASPA does not prohibit sports wagering outright, nor does it install any sort of

overarching federal regime for restricting or regulating sports gambling activities. Instead, PASPA dictates what states can and cannot do with their own state law.

As interpreted by the Third Circuit, PASPA gives states two choices: (i) maintain and freeze in place existing bans dating back to 1992; or (ii) completely repeal existing bans, allowing unfettered and totally unregulated sports wagering. In effect, only the first option is viable, as a total repeal of all regulation would be so irresponsible and politically impossible as not to be a real-world option. In short, Congress has impermissibly commandeered states' ability to govern effectively in this space by dictating the content of state law.[2]

The Third Circuit's construction in *Christie I* and *Christie II* of the types of state activity that are and are not allowable under PASPA exposes fundamental flaws in the law itself, as well as in the court's reasoning. PASPA provides, in relevant part, that "[i]t shall be unlawful for . . . a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" enumerated forms of sports wagering. *See* 28 U.S.C. § 3702(1). In *Christie I*, the Third Circuit held that PASPA would allow states to repeal in full all

2. Of course, Congress through its commerce power could pass a law banning sports wagering outright. *See Christie I*, 730 F.3d at 225 ("[T]here can be no serious dispute that the professional and amateur sporting events at the heart of the Leagues' operations 'substantially affect' interstate commerce."). But Congress has declined to do so. Instead, Congress has told the states that they cannot modify the bans on sports wagering they had in effect in 1992, regardless of whether a complete ban is still a wise policy choice in their judgment.

existing bans on sports wagering: "We do not see how having no law in place governing sports wagering is the same as authorizing it by law." *Christie I*, 730 F.3d at 232 (considering whether New Jersey's then-proposed legislation seeking affirmatively to license gambling on certain sporting events violated PASPA). *Christie II* stood by that holding, which is a plausible reading of the language of the statute. *See Christie II*, 832 F.3d at 396.

The panel and *en banc* decisions in *Christie I* and *Christie II* struggle to articulate what, if any, actions a state could take short of a full repeal of all regulation to change their laws as they stood in 1992. In *Christie I*, in reasoning that PASPA would not prohibit a full-scale repeal of all state regulation of sports wagering, the panel decision acknowledged a "meaningful distinction between repealing the ban on sports wagering and authorizing it by law." 730 F.3d at 232.

In *Christie II*, however, the *en banc* Third Circuit concluded that New Jersey's more recently enacted law—which partially repealed existing prohibitions against sports wagering—*would*, in fact, violate PASPA by impliedly authorizing sports wagering. According to the court of appeals, New Jersey's proposed partial repeal did not present "a situation where there are *no* laws governing sports gambling in New Jersey." *Christie II*, 832 F.3d at 396. Absent that law, "New Jersey's myriad laws prohibiting sports gambling" would apply. *Id.* The Third Circuit concluded that "the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited." *Id.*[3]

3. In *Christie I*, Judge Vanaskie anticipated the difficulty in drawing a bright line between legislation affirmatively authorizing

The *en banc* decision thus presents states with a binary choice that, in reality, is no choice at all: leave in place the current prohibitions on sports gambling or repeal all regulation of it. Complete repeal would mean that a state could not prohibit minors from gambling, could not impose any regulation at all to assure that those conducting the activity were competent and that their activities were done honestly, and could not limit the times or places where gambling can occur. States and citizens may disagree about whether sports betting should be permitted and, if so, to what extent, but the current range of reasonable debate does not include simply permitting unfettered sports wagering with no regulation at all. Thus, the states have no choice; they must leave the prohibitions they had in place in 1992 in place in perpetuity because the only other "choice" of complete repeal is not a real-world option.

To be sure, the *en banc* Third Circuit decision does attempt in dicta to identify a third option, suggesting that certain partial repeals of existing regulations *might* be possible under PASPA. It fails, however, to provide any coherent rationale or meaningful explanation of how PASPA could be read in that way.

The Third Circuit held that the partial repeal at issue in this case violates PASPA because it by implication "authorizes" sports wagering. Under that rationale,

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sports wagering and legislation impliedly authorizing such activities by repealing restrictions on gambling: "[R]ecognition of such a distinction is untenable, as affirmative commands to engage in certain conduct can be rephrased as a prohibition against not engaging in that conduct." 730 F.3d at 245 (Vanaskie, J., concurring in part and dissenting in part).

it would follow that *any* partial repeal would likewise "authorize" sports wagering because, by definition, it would remove an existing prohibition on the activity and permit that activity to be conducted, *i.e.*, "authorize" the previously forbidden activity. Logically, therefore, the Third Circuit's justification for invalidating New Jersey's partial repeal at issue here means that no partial repeal could pass muster.

There is also a logical inconsistency between the Third Circuit's at least implied view that a complete repeal of all regulation is permissible and its holding that a partial repeal, like that at issue in this case, is not. Specifically, if the kind of partial repeal of existing prohibitions on sports wagering at issue here by implication "authorizes" sports wagering, why doesn't a complete repeal do the same thing, in spades?

In any event, the kinds of limited repeals that the Third Circuit suggests *might* be permissible under PASPA would be so limited as to be trivial. The Third Circuit itself characterized the exceptions that might be permitted as "de minimis." *Christie II*, 832 F.3d at 402. The example it gives of a partial repeal that *might* pass muster is a repeal of the ban on social gambling among family and friends. Such limited exceptions, if they exist, would leave the states with no meaningful opportunity to regulate sports wagering. Authorizing sports wagering among family and friends has the same *de minimis* impact as a partial repeal of state alcohol laws to allow a member of a minor's immediate family to offer a 19-year-old a glass of wine at a private holiday function.

In sum, such limited exceptions, even if permissible, would leave states with no meaningful ability to regulate; states would be relegated to dealing with trivial and marginal issues. PASPA therefore provides a binary choice of either the status quo of prohibition, or complete repeal. No state currently permits totally unfettered and unregulated gambling of any kind, let alone of sports wagering, and one could not reasonably question that there is a national consensus against doing so.[4] Thus, states have no choice at all but to freeze their laws as they existed 25 years ago, with the possible (but unlikely) exception of making trivial adjustments of no real consequence at the margins.

At bottom, by precluding states from modifying their existing laws, with only undefined and narrow possible exceptions that are of no practical use to states, PASPA effectively freezes state law as it existed in 1992. States are thereby stuck with the policy decisions they made in 1992, with no ability to modify their regulations in response to changing times, changing views, changing technology, and changing political alignments. Put differently, state officials are left responsible and politically accountable

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4. In fact, PASPA itself reflects Congress's recognition that sports wagering, if permitted at all, must be regulated. First, Congress exempted from PASPA's prohibition on state authorization of sports wagering the existing, highly regulated betting permitted in Nevada, as well as existing regulated sports lottery arrangements in Montana, Delaware, and Oregon. *See* 28 U.S.C. § 3704(a)(1)-(2); *Christie I*, 730 F.3d at 216. Second, PASPA allowed New Jersey a one-year window during which it could license sports wagering in Atlantic City, but only "pursuant to a comprehensive system of State regulation." 28 U.S.C. § 3704(a)(3)(B); *Christie I*, 730 F.3d at 216.

for continuing the regulations in place a quarter century ago but with no ability to change those regulations with the benefit of experience or otherwise.

B. This Court's precedent demonstrates that PASPA impermissibly commandeers states' ability to regulate private conduct in a field squarely within their defined responsibilities that has not been preempted by federal law.

The Third Circuit's determination that PASPA may, consistent with the Tenth Amendment, prohibit states from repealing or modifying existing sports wagering laws contravenes this Court's anti-commandeering precedent. It also fails to appreciate the severe adverse effect of its ruling on states' critical ability to regulate private conduct within their respective jurisdictions. The Third Circuit erred in holding that this legislation does not commandeer states' ability to govern.

At the heart of this Court's jurisprudence on anti-commandeering issues is the principle that Congress cannot dictate to states how they must regulate private conduct within their jurisdictions. Congress has broad powers to regulate private conduct itself and to preempt a field,[5] but may not direct states as to how they must

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5. Congress may preempt state law in three circumstances. First, Congress may "enact[] a statute containing an express preemption provision." *Arizona v. United States*, 567 U.S. 387, 388 (2012). Second, "state laws are preempted when they conflict with federal law." *Id.* Third, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id.* Here, Congress has not exercised any of its preemption options to legislate sports wagering.

regulate private conduct not otherwise preempted. *See New York v. United States*, 505 U.S. 144, 162 (1992) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). The Third Circuit recognized as much in analyzing the difference between federal legislation that affirmatively requires states to enact a particular law or to regulate in a particular manner, and federal legislation that prevents states from acting. *See Christie II*, 832 F.3d at 399.

What the Third Circuit did not appropriately value, however, is that at the same time PASPA prevents states from taking affirmative action, it does not create any kind of federal regime (nor does one already exist) to regulate or to enforce a ban on sports wagering. This key fact distinguishes the cases relied on by the Third Circuit from the facts at issue here.

The legislation at issue in the cases cited by the Third Circuit as examples of permissible regulation in a pre-emptible field created affirmative, federal regulatory frameworks. *See Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 268-69 (1981) ("'The Surface Mining Act is a *comprehensive statute* designed to 'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'") (emphasis added); *F.E.R.C. v. Mississippi*, 456 U.S. 742, 766 (1982) ("We recognize, of course, that the choice put to the States—that of either abandoning regulation of the field altogether or considering the federal standards—may be a difficult one.").

Indeed, the very purpose of passing the federal legislation at issue in *Hodel* was the need to enforce important federal environmental standards related to surface mining and its impact on interstate commerce. *See Hodel*, 452 U.S. at 280 (noting that congressional committees "also explained that inadequacies in existing state laws and the need for uniform minimum nationwide standards made federal regulations imperative").

Notably, the statute at issue in *F.E.R.C. v. Mississippi* required states to consider certain standards, but did not direct states as to what decision to reach after giving those standards consideration. This Court's decision turned on that critical distinction between requiring a decision-maker to consider an option without dictating the outcome, and directing the decision-maker as to what decision it must make. *See F.E.R.C.*, 456 U.S. at 764 ("Titles I and III of PURPA require only *consideration* of federal standards. And if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals.") (emphasis in original). Furthermore, because the only requirement levied on states under PURPA was that they consider federal standards for electricity and gas utilities, states were free to exit the field and leave the hard work and expense of regulating to Congress. *Id.* at 764-66. In other words, states had a choice: regulate pursuant to federal standards or let Congress regulate.

PASPA, on the other hand, gives states no such power to make decisions; to the contrary, it effectively requires states to maintain state law as it existed in 1992 contrary to both law and policy. *See, e.g., Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187 (1999)

(federal policy is to "defer to, and even promote, differing gambling policies in different States").

C. As a practical matter, states must be allowed to regulate sports wagering within their borders unless Congress chooses to preempt the field by outlawing or regulating such gambling activities itself.

The court of appeals also did not appropriately evaluate the practical ramifications of allowing Congress to prevent states from enacting *and modifying or repealing* legislation when there is no existing federal legislative or regulatory regime. Preventing any and all types of state action in such circumstances would freeze state laws in time and rob the states of their ability to govern.

Here, for example, under the Third Circuit's logic, states have not been able to take any legislative action related to sports wagering for 25 years—*i.e.*, since PASPA's enactment in 1992. There have been undeniable and significant developments in the gambling marketplace since that time. Among other things, since 1992, Internet gambling, along with smart phones and related applications, have revolutionized gaming, making it a more accessible and dynamic market. *See, e.g.*, James Banks, *Online gambling and crime: a sure bet?*, *The ETHICOMP Journal*, 2012 (noting that online gambling has flourished since the advent of the first gambling software in 1994 and, more recently, encrypted communication mechanisms enabling online financial transactions), *available at* http://shura.shu.ac.uk/6903/.

And yet, according to the Third Circuit, states have absolutely no power to react and adapt to those changes—even in the barest sense of modifying or repealing existing laws that the states and their citizens believe are outdated and unwise.

States have an obvious and substantial interest in regulating gambling within their borders. As other *amici* have noted, illegal gambling opportunities and activities have only grown since PASPA's enactment—a reality that inures to the detriment to the states and their citizens.[6] *See Christie II*, 832 F.3d at 395-96. Gamblers who would embrace legal sports gambling turn to the black market, which costs states legitimate revenue and taxes they would otherwise be collecting, and may even contribute to the spread of other illegal activities. *See id.* at 395-96 (acknowledging that PASPA "has been criticized for encouraging the spread of illegal sports gambling"); *id.* at 392 (acknowledging testimony before the New Jersey Legislature advising that regulated gambling would generate much-needed revenues for the state); *see also* Jay S. Albanese, *Illegal Gambling & Organized Crime: An Analysis of Federal Convictions in 2014*, at 4–5 (2015), https://stopillegalgambling.org/aga-assets/uploads/2016/03/Albanese_Illegal_Gambling_OC_Report_2014_cases_FINAL.pdf (connecting illegal gambling operations to crimes such as money laundering, racketeering, human and drug trafficking, and extortion).[7]

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6. *See* Brief of the American Gaming Association as *Amicus Curiae* in Support of Petitioners, at 11-12 (filed Nov. 14, 2016).

7. The Third Circuit's apparent assumption that allowing states to do *anything* in the gambling space would increase black market gambling is unsubstantiated and highly debatable.

In a rapidly changing area like gambling and sports betting, where there are strong and divergent views for and against legalization, legislators must make difficult and controversial choices. Congress could certainly take up the torch, pass a law banning sports betting, and thus assume full responsibility not just for choosing the nature and scope of regulation, but also for managing constituent expectations, fielding feedback, and accepting political accountability for the decision. Barring such action by Congress, however, state legislators step in, govern, and then must deal with whatever fallout is created by unpopular policies. *See Printz v. United States*, 521 U.S. 898, 920 (1997) ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens.").

Under either scenario, one of the two governing bodies (federal or state government) takes control and is responsible for intended and unintended outcomes. *See id.* (touting the federalist system as one "establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it") (quoting *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

Christie I, 730 F.3d at 216-17 (citing Senate Report asserting that "legalization has a negligible impact on, and in some ways enhances, illegal markets"). There is certainly support for the argument that making sports betting available legally has a beneficial effect. *See, e.g.*, Brief of the American Gaming Association as *Amicus Curiae* in Support of Petitioners, at 19-21. Furthermore, in the absence of preemption by federal law, it is for the states to make the important policy decisions in this area based on their own assessments of the available evidence. But under PASPA states have not been given that chance.

Here, however, the Third Circuit has construed PASPA as a shadow order of government in which Congress appears to act, but acts only on the states—not directly on private citizens—by preventing states from enacting, repealing, or modifying state laws related to sports gambling. In so doing, Congress has created the illusion that the states are in charge of gambling policy even though, as a practical matter, states cannot do anything other than keep existing prohibitions in place (or take the irresponsible and politically untenable route of permitting sports wagering by children and with no regulation at all to protect against corruption and other dangers). That is not only an incorrect result; it is also unjust. *Cf. New York*, 505 U.S. at 185 (under federal legislation that offered states a "legitimate choice," states "retain[ed] the ability to set their legislative agendas; state government officials remain[ed] accountable to the local electorate").

In such circumstances, unhappy constituents will blame state officials for the retention of unpopular policies even though, in reality, it is the federal government that has made the policy choices and has attempted—albeit passively—to regulate. That is a perverse result because it undermines one of the basic tenets of democracy whereby government officials are responsible to the citizens they represent for their decisions and policy choices. *See id.* at 168-69 ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in

accordance with the views of the local electorate in matters not pre-empted by federal regulation.").

Because Congress has chosen not to preempt the field by regulating the conduct of private persons in this critical area, states should be free to exercise their own judgments about whether to permit sports gambling, and, if so, on what terms. And yet, by the Third Circuit's reasoning, the states—in particular, state legislators—have their hands tied with state law frozen in place as it existed 25 years ago. Congress cannot, on the one hand, elect *not* to make the decision itself that the dangers of sports wagering are sufficiently important as to justify prohibiting the activity, but at the same time require states—as a matter of state law—to prohibit the activity, regardless of what the states' own independent judgments might be as to the cost-benefit calculations regarding permitting sports wagering. Put differently, Congress must fish-or-cut-bait. If it wants to leave regulation of sports wagering to state law, then the states must be free to make meaningful decisions about how to regulate sports wagering. *See Printz*, 521 U.S. at 928 (advising against "reduc[ing] [the states] to puppets of a ventriloquist Congress") (internal quotations and citation omitted).

II. Upholding the constitutionality of the construction of PASPA adopted by the Third Circuit would allow Congress to freeze state and local law on other issues of critical importance to state and local governments and their constituents.

The Third Circuit's rationale for upholding the constitutionality of its construction of PASPA is not limited to sports wagering. To the contrary, there is no

limiting principle that would prevent that same rationale from permitting Congress to dictate the content of state and local law in any number of other important topics of public concern, without itself taking responsibility for preempting the field with direct federal regulation of private conduct.

One example is provided by the regulation of narcotics—*i.e.*, ensuring that certain drugs are available for medical use but are also kept off the streets. Indeed, this Court has acknowledged that states have an obvious interest in the regulation of narcotics, whether it is to ensure that dangerous drugs remain off the streets or that certain narcotics are available for medical use by state residents. *See, e.g.*, *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) ("It is, of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions."). "'We need to curb abuse,' says New Mexico Senator Craig Brandt (R). 'At the same time, we need to make sure we don't make it more difficult for those who need pain medication to receive it,' says the disabled veteran who lives with chronic pain." *See* Jane Hoback, *Legislators from both sides of aisle are working together to fight the widespread, deadly abuse of heroin and prescription painkillers*, National Conference of State Legislatures (Apr. 1, 2016), https://goo.gl/5o5jfH.

The federal government also has an interest in regulating narcotics; Congress can (and routinely does) pass legislation aimed at eliminating (or severely restricting) the market for controlled substances. For example, Congress recently passed the Comprehensive Addiction and Recovery Act (CARA), Pub. L. No. 114-198—a "comprehensive effort undertaken to address the

opioid epidemic, encompassing all six pillars necessary for such a coordinated response – prevention, treatment, recovery, law enforcement, criminal justice reform, and overdose reversal." Community Anti-Drug Coalitions of America, The Comprehensive Addiction and Recovery Act (CARA), Public Law 114-198 https://goo.gl/PcpXcC (characterizing the Act as the "first major federal addiction legislation in 40 years").

Imagine, however, if Congress adopted a law similar to PASPA precluding states from "authorizing" any medical use of narcotics not already authorized as of the date of enactment of the federal statute. In such circumstances, states might not want to repeal *all* laws restricting or banning medical use of narcotics. At the same time, states might conclude that repeal of some state bans makes sense. For example, if a state were to determine that important medical needs or other issues specific to that state trump countervailing considerations, it might exercise its judgment to permit narcotic use in those limited circumstances. Under the Third Circuit's approach, a law similar to PASPA directed to narcotics would tie the states' hands, even if Congress had not adopted any actual preemptive federal regime.

That is just one example; there are countless other areas of law in which there is no federal legislation and states have enacted widely divergent legislation to manage the issue. For example, state law varies considerably as to the legality of physician-assisted death for the terminally ill—a highly controversial topic that states have managed differently. Five states and the District of Columbia have legalized the practice through legislation; another state has legalized assistance when ordered by a court; 37 have

prohibited the practice by statute; and another three prohibit the practice by common law. *See* State-by-State Guide to Physician-Assisted Suicide, ProCon.org (Feb. 21, 2017), *available at* https://euthanasia.procon.org/view.resource.php?resourceID=000132.

If Congress were to enact legislation parallel to PASPA prohibiting states from authorizing physician-assisted death not already authorized as of the date of enactment, states' hands would again be tied. No matter how public opinion or medical technology might evolve and change, a state that prohibited any form of physician-assisted death when the federal statute was enacted would have no flexibility to adjust its laws (or would have only the untenable option of repealing all regulation on the topic).

Similarly, concern for the rise in drug misuse and substance abuse during pregnancy and the resulting increase in infants born with drug dependence has led to debate by lawmakers at both the state and federal level as to the best legislative approaches to address the problem. The options discussed include criminalization of drug misuse that results in harm to infants and funding for non-punitive treatment programs. *See* The American Congress on Obstetricians and Gynecologists (ACOG), Toolkit on State Legislation, Pregnant Women & Prescription Drug Abuse, Dependence and Addiction, https://goo.gl/LP4nr2; ACOG, Improving Treatment for Pregnant and Postpartum Women Act, https://goo.gl/4qahs4 (discussing best approaches, including federal legislation reauthorizing residential treatment programs for pregnant and postpartum women). The medical community's understanding of the effect of certain drugs, both prescription and illegal, on the fetus, is continually

developing. There are strong feelings and conflicting views as to whether and how government should regulate in this area.

Here again, Congress could preempt the field by adopting nationwide federal regulation. What it should not be permitted to do is to pass a statute similar to PASPA that dictates to state and local governments the content of state and local law on the subject. Such a statute would paralyze the ability to react to new information, with potentially devastating consequences to mothers and infants.

Absent comprehensive federal regulation preempting the field, state and local governments similarly must be given flexibility to deal with technological advancements presenting unforeseen challenges and legal issues. For example, as the availability and complexity of self-driving and driverless cars increases, states will necessarily need to revisit and adapt existing safety and licensing requirements to the changing technology. Yet, if the Third Circuit's interpretation of PASPA is upheld, there would be nothing to prevent Congress from effectively directing states to freeze in place laws written in the 1980s, 1990s, and even 2000s, when self-driving cars were nothing more than the stuff of science fiction fantasies.

In sum, there is no doubt that Congress maintains the ability to preempt state law in a variety of areas. Where Congress has declined to do so, however, it may not, consistent with the Tenth Amendment, dictate that state and local government maintain their current laws and regulations in effect as matters of state and local law, with no meaningful ability to adjust or modify those laws.

CONCLUSION

The Third Circuit's reading of PASPA offers states only one real-world option: to freeze in place whatever state laws were on the books in 1992, no matter how outdated and inappropriate a state may now consider those laws to be. Put differently, PASPA acts directly on the states by dictating to them what the content of state law as to sports wagering must be, notwithstanding that Congress has not preempted the field by way of federal regulation. So read, PASPA impermissibly commandeers states' ability to govern themselves. The practical implications of the decision below are far-reaching and profoundly negative. This Court should reverse the decision of the court of appeals.

Respectfully submitted,

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GOVERNOR OF NEW JERSEY, et al.,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,
Respondents.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NEW SPORTS ECONOMY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE[1]

The New Sports Economy Institute ("NSEI") is a 501(c)(3) non-profit, tax exempt organization dedicated to personal empowerment through sports and finance. Consistent with this mission, NSEI (i) champions the socially beneficial union of sports, money, and purpose in the form of regulated financial products, (ii) envisions new programs that will lead to meaningful job creation, significant economic growth and increased tax revenues based on sports as an asset class, and (iii) advances financial literacy by teaching finance through sports. A key objective of this three-part mission is to end sports gambling.

NSEI and its predecessor entities have considerable expertise in the fields of sports and finance. Currently, NSEI operates AllSportsMarket, which enables users to trade stock-like instruments based on sports performance. In 2008, a sister entity of NSEI developed SportsRiskIndex, a proxy for valuing sports franchises and associated index futures. As a result, NSEI is in a unique position to identify issues not addressed by either party. NSEI offers a unique point of view, *viz.*, that there is a difference between 'gambling' and 'gaming,' which impacts the Constitutional roles of state and federal governments with regard to the issues herein.

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[1] Rule 37 statement: Letters evidencing consent to file amicus briefs have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus NSEI funded its preparation or submission.

SUMMARY OF ARGUMENT

To properly decide this case, the Court should dispel the myth that gambling and gaming are equivalent.

The Petitioners and their *amici* fundamentally posit that gambling is a matter reserved to the states: few powers are reserved to the federal government and, absent a federal law that preempts state law, states should be able to experiment and design their own gambling policies. This reasoning, while superficially sound, is a house of cards because as applied here it rests entirely on the fictitious equivalence of gambling and gaming.

What is gambling? What is gaming? Are they the same? In fact, gambling and gaming are not equivalent. Gaming, as properly defined, is traditionally a matter to be regulated by the States, while gambling is so only if it involves *gambling games*.

For something to constitute a "game," it must have boundaries and be disconnected from real life, a concept that the social sciences recognized a long time ago. *Amicus curiae* NSEI provides a critical insight not raised by either party: sports betting and daily fantasy sports ("DFS"), which rely entirely on "real life," are not games.

If sports betting and DFS are not games, they must be markets. If so, the contracts traded thereon are either (unregulated) securities or commodity contracts and subject to regulation as such. Congress has preempted the field with respect to listing and trading of such contracts. State law must yield to federal law as required by the Supremacy Clause.

Contrary to the assumptions made by Petitioners and their supporting *amici*, in fact there *is* a federal regulatory interest to protect and the matter *is* preempted by federal law. Because gambling contracts (such as sports betting and DFS) constitute financial instruments subject to regulation by the Securities and Exchange Commission ("SEC") and Commodity and Futures Trading Commission ("CFTC"), the federal regulatory interest clearly exists and Congress has preempted the field.

Indeed, the Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3701 *et seq.* ("PASPA") should be recognized as part and parcel of the dual regulatory regime that governs our nation's financial markets. By effectively outlawing sports betting nationwide through PASPA, Congress clearly recognized that sports gambling contracts do not serve any purpose whatsoever. We infer that instead of burdening the regulatory agencies with ruling on "purposeless products," Congress, through PASPA, simply chose to relieve the regulatory agencies from such endeavors.

Therefore, as a restriction on markets offering purposeless products, PASPA is a valid exercise of Congress under the Supremacy Clause consistent with the laws establishing the SEC and CFTC. A holding to the contrary would create lopsided incentives and a disjointed result: permitting creation of financial contracts with *no* purpose, hiding behind the veil of *state experimentation*, would permit a new financial market to escape federal regulation and could instantly become a better strategy than creating a product with *some* purpose.

ARGUMENT

I. The Court Should Define, and Distinguish Between, "Gambling" (a Matter for the Federal Government if it Involves Markets) and "Gaming" (a Matter for the States) to Properly Decide the Case

Definitions matter. The core premise that powers the Petitioners' argument is that gambling falls under the States' police power and, thus, sports betting and DFS are matters to be regulated by the States. However, the argument assumes that "gambling" and "gaming" are the same. As demonstrated below, they are not.

As an initial matter, there appears to be a fairly universal consensus that gambling and gaming are equivalent, and the terms are commonly used interchangeably. The American Gaming Association ("AGA") correctly observes that "[t]raditionally, gaming regulation has been a matter of state and local concern," but later asserts that PASPA, a law about sports *gambling*, is problematic because it "contradicts this tradition of federal deference to state gaming laws." Brief of the American Gaming Association as Amicus Curiae in Support of Petitioner at 18, *Gov. Christie et al.* v. *Nat'l Collegiate Athletic Ass'n et al.* (Nos. 16-476 and 16-477) (November 2016). The only case cited by AGA in support of its argument is *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999), which according to AGA asserted that: "Federal policy is 'to defer to, and even promote, differing gambling policies in different States.'" *Id.*, at 187. However, the full sentence shows that this Court made this statement in the context of lotteries and casino gaming: "That Congress

has generally exempted *state-run lotteries and casinos* from federal gambling legislation reflects a decision to defer to, and even promote, differing gambling policies in different States." *Id.*, at 187 (emphasis added).

The *amici* States also conflate the two terms, asserting that "[i]t is beyond doubt that the rights and obligations attending *sports wagering* fall within these reserved or 'police powers' of the States." (emphasis added). Brief of Amici Curiae States of West Virginia, Arizona, Louisiana, Mississippi, and Wisconsin in Support of Petitioners 19-20, *Gov. Christie et al. v. Nat'l Collegiate Athletic Ass'n et al.* (No. 16-476) (November 2016). They similarly cite a single case, *Ah Sin v. Wittman*, 198 U.S. 500 (1905), and cherry-pick a line: "The suppression of gambling is concededly within the police powers of a state." Yet *Ah Sin* involves gambling games such as cards and dice.

The practice of using the terms gambling and gaming interchangeably is widespread. Even two widely regarded gaming attorneys, one of whom actually trademarked the phrase Gambling and the Law® stated: "[T]he Nevada Supreme Court issued the amazing ruling that the regulation of legal gambling is purely a state legislative issue." Walter T. Champion, Jr. and I. Nelson Rose, *Gaming Law in a Nutshell* 89 (2012) (citing *State v. Rosenthal*, 93 Nev. 36, 559 P.2d 830 (Nev. 1977)). However, the *Rosenthal* case was about *gaming*, not gambling. "We view *gaming* as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution." *Rosenthal*, 559 P.2d at 836 (Emphasis added). In fact, the word "gaming" appears

55 times in the *Rosenthal* opinion, and the word "gambling" precisely once (in a cite from another case).

One law review article similarly took *Rosenthal* out of context. See Kathryn Keneally, *State Regulation of Casino Gambling: Constitutional Limitations and Federal Labor Law Preemption*, 49 Fordham L. Rev. 1038, 1041 (1981) (citing *Rosenthal* and stating that "*gambling* is 'a matter reserved to the states within the meaning of the Tenth Amendment'.") (emphasis added).

It might be impossible to know the full extent of such loose equivalence, but the fact that it has permeated through two amicus briefs in this case alone, and one of the leading books on gaming law, should be viewed as a substantial red flag.[2]

In order to properly evaluate the core premise that gambling is a matter of state law, we must first agree on how to define gambling and gaming.[3]

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[2] In May 2017, the House Energy and Commerce Committee released the Gaming Accountability and Modernization Enhancement Act (the "GAME Act") that is intended to remove the federal obstacles to legalized gambling at the state level (the GAME Act has a provision that repeals PASPA). Committee on Energy & Commerce, Press Release, "Pallone Unveils Comprehensive Gaming Bill & Solicits Feedback from Stakeholders" (May 25, 2017). It does not create a federal framework for gambling and instead allows states that choose to legalize and regulate sports betting and/or online gambling to do so. *Id.* The title of the Act could be seen as another instance where gambling would have been the more appropriate word to use.

[3] To the extent dictionary definitions treat gambling and gaming the same, *amicus curiae* argues that this Court should

A. Gaming is Separated from Real Life and Involves Precise Limits of Space

As early as 1950, a Dutch historian explained that "play is distinct from 'ordinary' life both as to locality and duration." Johan Huizinga, *Home Ludens: A Study of the Play-Element in Culture* 9 (1950). "We found that one of the most important characteristics of play was its spatial separation from ordinary life. A closed space is marked out for it ... hedged off from the everyday surroundings." *Id.*, at 19.

Roger Caillois, a French sociologist, agreed: "In effect, play is essentially a separate occupation, carefully isolated from the rest of life, and generally is engaged in with precise limits of time and place. There is place for play: as needs dictate, the space for hopscotch, the board for checkers or chess, the stadium, the racetrack, the list, the ring, the stage, the arena, etc. Nothing that takes place outside this ideal frontier is relevant... In every case, the game's domain is therefore a restricted, closed, protected universe: a pure space." Roger Caillois, *Man, Play and Games* 6-7 (1961). Caillois consistently underlined the spatial separation as a foundational characteristic of a game: "[Games] certainly cannot spread beyond the playing field (chess or checkerboard, arena, racetrack, stadium or stage)." *Id.*, at 43.

It is true that advances in technology allow two people to play a game, say chess, even when they are not within a confined space. However, if they wished to bypass technology and play the game the old-fashioned way, they could do it. This is not true for

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DFS and sports betting. The issue is not that these activities can be carried out online, or via an app. It is the fact that these alleged "games" could not conclude without having a connection to real life.[4] That fact was true even when fantasy sports was born at the New York French bistro La Rotisserie Francaise close to 50 years ago. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 Harvard Journal of Sports & Entertainment Law 1, 5-6 (2012).

In fantasy sports, something of value is risked and received, yet it is not a game.[5] To the contrary, it is a market. In markets, *multiple parties can engage in an economic transaction where outcomes are dependent on real-world events and / or information provided by those events.* Critically, without those events and the information provided by them, the final economic outcomes cannot be determined. In addition, the events will continue to take place regardless of whether somebody else is risking money on them. A farmer will harvest more oranges this year, an oil-rich country could decide to cut its supply, regulatory approval for a drug will be granted, and so

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[4] This point can be visualized by imagining the activity taking place on Mars. Lacking a connection to real life, the participants would be unable to track the real-life performance of the athletes. Therefore, the simple reality is that there cannot be a winner of a fantasy sports "game" on Mars, while in every other game, chess, card games, spelling bee, scribble etc., a winner can be identified based on a predetermined set of rules (assuming, of course, that the requisite game sets/pieces are available).

[5] As such, the question "Is DFS a game of skill?" is the wrong one because it cannot be a game of skill *if it is not a game in the first place.*

on. The actors within an economy will mind their own business, perhaps unaware of the fact that somebody, somewhere is speculating on whether such real-life endeavors will be successful.

B. Our Nation has Two Different Frameworks to Distinguish Between Gambling in Games and Gambling in Markets

What is gambling? The answer depends on whether we are within the domain of games or markets. Gambling cuts across both domains – there can be gambling games and gambling markets – but the test that is used to answer "what is gambling?" is completely different depending on the domain.

On the one hand, in the context of games and contests, the skill-chance spectrum is determinative of the question. The greater the level of chance, the more likely the game will be deemed gambling.

For example, roulette is 100% chance; therefore, it is gambling. On the other hand, chess is 100% skill and therefore is not gambling. Poker is arguably somewhere in the middle, which makes the determination difficult. For games in the middle, the question is i) how much skill is involved; and ii) what is the level of chance needed that would tip the game toward the gambling end of the scale. Significant uncertainty may exist on both dimensions and the ensuing debate could go on forever.

The markets have an entirely different spectrum. In *any* market, skill is simply a prerequisite to get ahead, but it does *not* determine whether a market is characterized as gambling or not. We submit the relevant spectrum is "public interest." At

one end, contracts that clearly serve a purpose are not gambling and, at the other end, contracts that are pure entertainment vehicles are clearly gambling.

For example, the securities markets help with capital formation and price discovery, and offer investors a menu of assets for portfolio management purposes. Similarly, the derivatives markets are socially useful because they facilitate hedging and/or price discovery. These, then, are not gambling.

Some prediction markets arguably stand somewhere in the middle on the spectrum of public interest. For example, a proposed domestic box office receipt derivative survived a 3-2 vote at the CFTC, but was later rejected by Congress with the passage of the Financial Reform Act. Jeremy A. Gogel, *The Case for Domestic Box Office Receipt Derivatives*, 14 Chapman L. Rev. 415, Winter 2011. Political event contracts proposed by the North American Derivatives Exchange, on the other hand, were prohibited by the CFTC as essentially against the public interest. Order Prohibiting the Listing or Trading of Political Event Contracts, CFTC, April 2, 2012.

Sports gambling, *i.e.* sports betting and DFS, are clearly at the other end of spectrum. They are entertainment vehicles that do not serve a purpose. Sports gambling proponents have never argued otherwise. Instead, they took an element inherent in any market – skill – and used that as justification to avoid the gambling characterization. However, a critical step was missed and an *assumption* was made. Sports betting and DFS are not themselves games and should have been analyzed within the framework of markets.

While a clear demarcation between games and markets has apparently never been explicitly established, at least one State has captured the essence of the difference. New York Penal Law provides: "A person engages in gambling when he stakes or risks something of value *upon the outcome of a contest of chance or a future contingent event not under his control or influence*, upon an agreement or understanding that he will receive something of value in the event of a certain outcome." (emphasis added). N.Y. Penal Law § 225.00(2).

The lawmakers in New York had excellent foresight because they saw early on that gambling can occur in two different ways, through gambling games *or* through gambling markets, and codified that into law. The "skill vs. chance" part of the test is meant to capture gambling games and the "future contingent event" language is intended to capture the gambling markets.[6]

Why has this crucial regulatory distinction between games and markets not been more clearly recognized? We can only speculate, but two main trends emerge.

First, some gambling markets, at least initially, "mimicked" games to some extent from a spatial

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[6] Notwithstanding an erroneous legislative finding that DFS is not a "wager on future contingent event not under the contestant's control or influence" in N.Y. Senate Bill S8153 (*See* State of New York, 8153, in Senate at 1 (June 14, 2016)) (signed into law in August 2016), DFS is clearly gambling under that definition. S8153 not only identifies DFS incorrectly as a "game" but may indeed be unconstitutional under the New York State Constitution.

separation perspective. Betting on horses occurred at the racetrack where the horses ran. Fantasy sports was "played" in a restaurant with the gamblers being in the same room even though the sports games took place elsewhere. Gambling happened in a closed space, and gambling markets looked and felt like gambling games.

Second, excessive speculation, actual or perceived, gave the capital markets a bad reputation. The concept of Wall Street as a casino found broad appeal with progressives, supported by a skeptical media. The phrase "playing the market" has firmly entrenched itself into the American zeitgeist. A well-regarded figure in both Las Vegas *and* Wall Street recently referred to both sports betting and the stock market as "games." Edward O. Thorp, *A Man for All Markets: From Las Vegas to Wall Street, How I Beat the Dealer and the Market* 129 (2017). Even in legal circles, it is not uncommon to see financial markets referred to as "gambling." "[T]here are no comparable barriers to the investment markets — thereby allowing access to 'legalized gambling' for all." Thomas Lee Hazen, *Disparate Regulatory Schemes for Parallel Activities: Securities Regulation, Derivatives Regulation, Gambling, and Insurance*. Annual Review of Banking and Financial Law, 24 Ann. Rev. Banking & Fin. L. 375, 377-78 (2004). In short, financial markets looked and felt like gambling games.

As the line between games and markets blurred, any distinction between what constitutes gambling versus gaming likewise became obscured. This definitional ambiguity is not a minor matter, because it can provide precisely the framework needed

to delineate the boundaries of federalism in this case. The Court has an opportunity to clear up the confusion by defining gambling and gaming.

II. PASPA is Part of a Broader, Preemptive Federal Regulatory Regime

In 1992, Congress enacted PASPA "to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime." Senate Report 102-248 (1991). PASPA effectively outlawed sports betting nationwide, excluding a few states.

Petitioners ask the Court to declare PASPA, the biggest obstacle to legalized, nationwide sports gambling, unconstitutional. A world without PASPA would be an uneven one: people would be able to speculate on the outcome of a sports game as they wish, but not on the outcome of an election. In early 2016, if one wanted to speculate that Donald Trump would win the presidential elections and risk $10,000, he could not do it, at least not legally. Faced with a submission regarding the self-certification of various political event contracts by the North American Derivatives Exchange, the CFTC has found that "political event contracts are contrary to the public interest" and ordered that such contracts shall not be listed or made available for clearing or trading on the Exchange." Order Prohibiting the Listing or Trading of Political Event Contracts, CFTC, April 2, 2012.

Sports gambling lacks an identifiable purpose. Political event markets, as opposed to sports gambling, can at least claim *some* purpose. It is widely acknowledged that they "yielded very accurate predictions and also outperformed large-scale polling

organizations." Justin Wolfers and Eric Zitzewitz, *Prediction Markets*, Journal of Economic Perspectives 18 (Spring): 103, 112 (2004). Sports gambling offers no purpose whatsoever, nor do its proponents claim otherwise.

Petitioners would create an incongruous world where entrepreneurs are at the mercy of federal regulation only so long as their products contain *some* purpose. But strip *all* purpose from your product, and under their argument there is a chance that federal law will not reach you, to the delight of a State such as New Jersey. PASPA successfully preempted this result for decades. We suggest that as such PASPA is best understood as part of our nation's federal laws governing securities and commodities. Equally importantly, PASPA conclusively demonstrates Congress has preempted the field.

A. Congress Preempted the Field with Respect to Financial Contracts

The SEC was created shortly after the stock market crash in 1929 through the Securities Act of 1933 and the Securities Exchange Act of 1934 ("the 1934 Act") to "restore investor confidence in our capital markets by providing investors and the markets with more reliable information and clear rules of honest dealing." https://www.sec.gov/Article/whatwedo.html. The mission of the SEC is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." *Id.*

Initially, it was understood that the SEC supplements and does not totally preempt states' blue-sky laws. Over time, however, preemption was made stronger. Congress modified the 1934 Act's

preemptive powers in 1975. *Securities Acts Amendments of 1975*, Pub. L. No. 94-29, 89 Stat. 97 (1975). Then, "in the National Securities Markets Improvement Act ('NSMIA') in 1996, in contrast to the prior federal securities laws, Congress explicitly preempted vast areas of state regulation." Speech by SEC Staff: Remarks at the F. Hodge O'Neal Corporate and Securities Law Symposium, by Stephen M. Cutler, February 21, 2003, accessed at http://www.sec.gov/news/speech/spch022103smc.htm. In adopting NSMIA, Congress expressed its intent to "further advance the development of national securities markets" by establishing the SEC as "the exclusive regulator of national offerings of securities." *Id.*

Similarly, the CFTC was created by Congress through the Commodity Futures Trading Commission Act ("CFTC Act") of 1974, which also expanded the definition of a commodity to reflect the shifts in the U.S. economy away from its agricultural roots. The CFTC Act of 1974 also introduced the public interest standard for designation of commodity futures contracts and included an Economic Purpose Test, which permitted listing and trading of contracts that could be used for hedging and price basing on a more than occasional basis.

The CFTC has "exclusive jurisdiction" to regulate "transactions involving swaps or contracts of sale of a commodity for future delivery." 7 U.S.C. § 2(a)(1)(A). The legislative history of the CFTC Act of 1974 also makes clear that Congress intended to preempt state jurisdiction over the transactions that the CFTC Act covers: "[u]nder the exclusive grant of jurisdiction to the Commission, the authority in the

Commodity Exchange Act (and the regulations issued by the Commission) would preempt the field insofar as futures regulation is concerned. Therefore, if any substantive State law regulating futures trading was contrary to or inconsistent with Federal law, the Federal law would govern. In view of the broad grant of authority to the Commission to regulate the futures trading industry, the Conferees do not contemplate that there will be a need for any supplementary regulation by the States." *S. Conf. Rep. No. 93-1383, 93rd Cong., 2nd Sess.*, reprinted in 1974 U.S. Code Cong. & Adm. News, p. 5843, 5897.

The Commodity Futures Modernization Act ("CFMA") of 2000 retained the broad definition of commodity but introduced additional categories, and excluded some commodities to further modernize the Commodity Exchange Act and reflect the increased need for financial instruments used in risk management. With the CFMA, Congress also reiterated its intent to preempt state gaming statutes with respect to those transactions subject to CFMA's provisions.

Petitioners and their supporting *amici* do not – because they cannot – dispute the power of the Supremacy Clause. Instead, they hang their hat entirely on the alleged non-existence of a federal regulatory regime that preempts state law. "Because there is no system of 'federal regulation' of sports wagering, States do not have the option of ceding the field to the federal government." Brief for Petitioners at 19 (No 16-476). "There is no Federal regulatory regime for States to default to in the case of sports gambling," Brief of Amicus Curiae Researcher John T. Holden In Support of Petitioners at 3 (Nos. 16-476, 16-

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The alleged lack of preemption was also identified as a threshold issue by the American Gaming Association ("AGA"): "The fundamental legal question presented by these Petitions is whether a federal court can, consistent with federalism and dual sovereignty, enjoin a State from passing a law that neither violates the Constitution nor addresses *any matter preempted by federal law.*" Brief of the American Gaming Association as Amicus Curiae in Support of Petitioner at 3, *Gov. Christie et al.* v. *Nat'l Collegiate Athletic Ass'n et al.* (Nos. 16-476 and 16-477) (November 2016) (emphasis added).

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B. Sports Gambling Contracts Are (Unregulated) Securities or Commodity Contracts

Sports gambling contracts can potentially be characterized as either (unregulated) securities or, alternatively, as commodity contracts.

Sports gambling affords no margin of safety (one can lose his entire principal within a matter of hours, even minutes), and cannot be an investment if one adopts a classic definition: "An investment operation is one which, upon thorough analysis, promises safety of principal and a satisfactory return." Benjamin Graham, *The Intelligent Investor: The Definitive Book of Value Investing* (2005).

On the other hand, sports gambling is commonly *presented* as an investment opportunity. Mark Cuban, entrepreneur and owner of Dallas Mavericks, floated the idea of a "gambling hedging fund" that "only places bets", including sports bets. *Blog Maverick, My New Hedge Fund*, http://blogmaverick.com/2004/11/27/my-new-hedge-fund/. His vision became real; UK-based Galileo Fund (folded), UK-based Stratagem (raising money) and Australia-based Priomha Capital (operational) are all variations of the same idea.

There is more – right in our backyard. In 2015, Senate Bill 443 was passed in Nevada, which legalizes sports betting investment funds, similar to traditional mutual funds, that are registered and managed in Nevada but which could include participants from outside the state. *Nevada Legalizes Sports Betting Investment Funds*, www.espn.com/chalk, June 3, 2015. One company, incredulously, even positioned

sports gambling as a *superior* investment, and has effectively acknowledged that sports betting is a market: "Traditional investment options (bonds, stock market, real estate) are typically long-term and offer inadequate returns. Athletics Investments is a registered entity that operates like a traditional mutual fund, pooling investor's funds into a common hedge fund and investing them in the sports betting *marketplace*." https://www.athleticsinvestments.com/ (emphasis added).

Tellingly, FanDuel, a DFS operator, likens DFS to investing: "Like investors who make selections for their portfolios, or commodity or energy traders who have to anticipate weather impact on crops and demand for power, FanDuel contestants base their player selections on historical performance, statistics, research, matchups, and trends." *FanDuel Inc., and Head2Head Sports LLC vs. Lisa Madigan*, Complaint for Declaratory Judgment at 10, December 24, 2015.

One of SEC's main missions is to protect investors. Whether or not the opportunity presented to a potential investor is a true investment, or a highly speculative opportunity masquerading as an investment is not controlling. "Congress' purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called." *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990) (emphasis original). "To that end, it enacted a broad definition of 'security,' sufficient 'to encompass virtually any instrument that might be sold as an investment.'" *SEC v. Edwards*, 540 U.S. 389, 393 (2004) (citing *Reves*, 494 U.S. at 61 (1990)). "An investment contract thus came to mean a contract or scheme for "the placing of capital or laying

out of money in a way intended to secure income or profit from its employment.'" *SEC v. Howey Co.*, 328 U.S. 293, 298 (1946) (internal citations omitted). Sports gambling contracts are not true investments, but they could reasonably be characterized as investment contracts under the Howey test developed by this Court. *Id.*

In addition to investment contracts, some commentators have argued that sports bets could potentially be characterized as "notes" to be regulated under the existing federal securities laws. Michael C. Macchiarola, *Securities Linked to the Performance of Tiger Woods? Not Such a Long Shot*, 42 Creighton L. Rev. 29, 43 (2008).

Sports gambling contracts can also potentially be classified as commodity contracts. In relevant part, the Commodity Exchange Act defines the excluded commodity as an occurrence, extent of an occurrence, or contingency ... that is (I) beyond the control of the parties to the relevant contract, agreement, or transaction; and (II) associated with a financial, commercial, or economic consequence. 7 U.S.C. § 1a (19). "A broad interpretation of 'excluded commodity' might include betting transactions on sporting and other events. Wagers on sporting events might satisfy the definition because, absent chicanery, the occurrence or contingency is not within the control of the parties to the relevant contract and the outcome may be 'associated with an economic consequence,'" Paul Architzel, *Event Markets Evolve: Legal Certainty Needed*, Futures Industry, March/April 2006.

In addition, the legislative history of Dodd-Frank Act includes the example of a Super Bowl event contract as a contract that would not serve any commercial purpose. "[CFTC] needs the power to, and should, prevent derivatives contracts that are contrary to the public interest because they exist predominantly to enable gambling through supposed 'event contracts.' It would be quite easy to construct an 'event contract' around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament. These types of contracts would not serve any real commercial purpose. Rather, they would be used solely for gambling." *Congressional Record, Proceedings and Debates of the 111th Congress, 2nd Sess., Senate*, July 14, 2010.

If the Court decides that sports gambling is a gambling *market,* then sports gambling contracts are either (unregulated) securities or commodity contracts, and there is strong evidence that Congress, through creation of the SEC and CFTC, has occupied the field of sports gambling.

C. State Police Powers Are Hopelessly Inadequate with Respect to Sports Gambling

Almost a century ago, security transactions were reserved to the police powers of the state. In 1920, the Minnesota Supreme Court stated: "It is a proper and needful exercise of the police power of the state and should not be given a narrow construction, for it was the evident purpose of the legislature to bring within the statute the sale of all securities not specifically exempted." *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 55 (Minn. 1920).

Today, it is evidently clear that police powers are still needed to some extent. The Pennsylvania Supreme Court found that the 1934 Act did not preempt Pennsylvania state-law tort claims arising from a stock trader's assault of another trader on the floor of a national securities exchange. *Dooner v. DiDonato*, 971 A.2d 1187 (Pa. 2009). Referring to NSMIA, the SEC also clearly delineated when police powers may still be needed. "Specifically, under the legislation, the states were to 'continue to exercise their police power to prevent fraud and broker-dealer sales practice abuses,' but abstain from regulation of 'the securities registration and offering process.'" Speech by SEC Staff: Remarks at the F. Hodge O'Neal Corporate and Securities Law Symposium, by Stephen M. Cutler (February 21, 2003). Clearly, there is still a role for the state's police powers, but it is much narrower.

The demarcation between the federal and State police powers and the critical role that physical space plays in drawing those boundaries is quite sensible. If a game is played in a game parlor, any dispute would likely involve the people playing the game, the owners of that game parlor, or the residents nearby, and the state police power could regulate and protect the public health, safety, morals of the inhabitants of the State. The federal government would be relatively helpless in that situation and absolutely must rely on the police powers of an individual State.

In delineating federal and State power over gambling, Congress has declared that the States should have the primary responsibility for determining what forms of gambling may legally take place *within their borders*. 15 U.S.C. § 3001(a)(1)

(emphasis added). Other than the observation that using the word "gaming" would have been more appropriate (see section I *supra*), this finding is noteworthy for invoking the importance of spatial boundaries. Their existence is precisely what makes an activity a game.

A useful analogy can be made with the regulation of marijuana. This Court has found that "regulation is squarely within Congress' commerce power because production of [marijuana] meant for home consumption has a substantial effect on supply and demand in the national market for that commodity." *Gonzales v. Raich*, 545 U.S. 1, 16 (2005). While there may very well exist reasons that call for the federal government's intervention, marijuana consumption's *immediate* impact would arguably be on someone who shares the same physical space. If a casino patron at the poker table is bothered by a neighbor, it could be because the neighbor had a drink one too many, consumed too much marijuana, or was not following the gaming establishment's rules. Thus, it is not so much the morals and/or the libertarian arguments that bind alcohol, marijuana and gaming in the context of police powers. Rather, it is the *physical space*.

Sports gambling is different. Today, a resident of Illinois can bet on the outcome of a sports game, and not only does he not need to be in a Nevada casino (if betting through a mobile app), amazingly he does not even need to be in Nevada at all (if betting through a Nevada sports betting investment fund). On the other side of the bet could be a resident from New Jersey, sitting in a Nevada casino, sitting on the bench in a Nevada park, or sitting in his couch at home. The

game on which the gambler bet could be a game between a football team based in California and another one in Texas, organized subject to the rules of the National Football League, an organization headquartered in New York. The game would take place, in almost all cases outside Nevada, and in fact it may very well take place in a different country, such as the UK. Deciding that there is money to be made in sports betting, a fixer residing in Florida could decide to impact the outcome of a game by approaching a player or a referee in or around the sports arena.

Where does that leave us? The counterparties to the sports gambling contract, the teams, the players, the organizing entity of the games, and the potential fixer are all outside the State boundaries. The possibility of remote wagering can be attributed to advances in technology, but the primary issue is the fact the wagers cannot conclude without a connection to real life, i.e., sports games taking place outside a close space. Because no spatial separation exists, it is extremely difficult if not impossible, to see why this matter should be reserved to the police powers of the State at all.

D. This Case is Distinguishable from *Brown and Williamson* because the Relevant Regulatory Agencies Have Signaled Jurisdictional Intent

This Court has previously decided a similar jurisdictional issue in ruling on whether FDA could regulate tobacco. "Congress has not given the FDA the authority to regulate tobacco products as customarily marketed." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In doing so, the Court assigned substantial weight to FDA's own earlier

statements that it lacked jurisdiction. "This tobacco-specific legislation ... was adopted against the backdrop of the FDA *consistently and resolutely stating that it was without authority* under the FDCA to regulate tobacco products as customarily marketed." *Id.* at 122 (emphasis added).

This case is clearly distinguishable because both the SEC and the CFTC have already asserted jurisdiction with respect to a variety of similar, relevant products. For example, the SEC has regulated one sports market, Fantex, where investors buy and sell tracking stocks that track a star athlete's future income. *Fantex Inc., Form S-1,* October 17, 2013. In the case of Arian Foster, the athlete was paid $10 million upfront, but parted with 20% of all of his future contract and endorsement income. *Id.* In the eyes of the average speculator, it is quite likely that the product was primarily perceived as a mechanism to speculate on the performance of an athlete. Fantex, Inc. has said as much in its prospectus: "[t]he value of our Arian Foster Brand is dependent upon the performance of, and to a lesser extent, the popularity of Arian Foster in the NFL." *Id.*, at 10. Therefore, the SEC has already accepted responsibility to regulate a sports contract that is essentially a proxy for an individual athlete's performance.

The SEC has also taken action with respect to two daily fantasy platforms. In early 2015, an obscure site, called Stock Battle, was running a "fantasy contest" where participants were picking stocks. Stock Battle identified itself as the first fantasy gaming stock market competition. Stock Battle even cited (on a now-defunct website) the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA") as its

legal basis, just like DFS operators. The SEC sent Stock Battle a cease-and-desist letter and said the firm's games amounted to dealing in "unregulated security-based swaps." *Will Regulators Sideline Fantasy Stock-trading Games?*, Yahoo Finance (May 13, 2015). Stock Battle promptly closed its operations.

In a similar case, on October 13, 2016, SEC announced that Forcerank LLC, a New York-based company, had agreed to pay a $50,000 penalty for illegally offering complex derivatives products to retail investors through mobile phone games that were described as "fantasy sports for stocks." *Company to Pay Penalty for Stock Picking Game that was an Unregistered Swap*, SEC Press Release 2016.

In both cases, the underlying commodity was stocks, not sports performance, yet the markets otherwise operated in identical ways and even claimed relief under the same federal law, UIGEA. 31 U.S.C. § 5362. FanDuel even aligned itself with such platforms trying to justify its own existence. "[N]o one contends ... that a stock-picking contest is not a *bona fide* competition." *FanDuel Inc., and Head2Head Sports LLC vs. Lisa Madigan*, Complaint for Declaratory Judgment at 10, December 24, 2015.

The SEC clearly disagrees that such sites are legal. It does not make sense that stock-picking fantasy offerings amount to unregulated security-based swaps and athlete-picking fantasy offerings amount to games with skill. The alternative – that daily fantasy contracts are financial contracts – is much more plausible and the fact that the SEC took action with respect to the two examples cited above indicates jurisdictional intent.

Finally, more recently, the SEC has subpoenaed at least three Nevada entity wagering funds and demanded various pieces of information, which is, again, indicative of the SEC at least considering whether Senate Bill 443 potentially clashes with securities laws. https://www.legalsportsreport.com/12049/sec-subpoenas-nevada-entity-wagering-funds-for-information/.

CFTC has also been clearly considering similar jurisdictional issues. As early as 2008, CFTC solicited comments on the appropriate regulatory treatment of financial agreements offered by markets commonly referred to as event, prediction, or information markets. *Concept Release on the Appropriate Regulatory Treatment of Event Contracts*, Federal Register, 73 Fed. Reg. 25669 (May 7, 2008). CFTC asked, *inter alia*, "[w]hat objective and readily identifiable factors, statutorily based or otherwise, could be used to distinguish event contracts that could appropriately be traded under Commission oversight from transactions that may be viewed as the functional equivalent of gambling?" and "[w]hat are the implications of possibly preempting state gaming laws with respect to event contracts and markets that are treated as Commission-regulated or exempted transactions?" *Id.* This inquiry shows that CFTC clearly contemplates that the issues raised by DFS and sports gambling could fall within its regulatory jurisdiction.

One amicus asserts that Congress could task CFTC with oversight, but Congress has not done so. Brief of Amicus Curiae Researcher John T. Holden In Support of Petitioners at 6. That view is misinformed.

In 2010, Congress made it clear that the CFTC *has* the authority over *all types* of markets (unless SEC has jurisdiction), including sports markets. "[CFTC] needs the power to, and should, prevent derivatives contracts that are contrary to the public interest because they exist predominantly to enable gambling through supposed 'event contracts.' It would be quite easy to construct an 'event contract' around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament." *Congressional Record, Proceedings and Debates of the 111th Congress, 2nd Sess., Senate*, July 14, 2010. Clearly, Congress, unlike in *Brown & Williamson*, intended to give CFTC the requisite authority to regulate (or ban if they are purposeless) at least a subset of sports market contracts.

E. This Case is Also Distinguishable from *Brown and Williamson* Based on Congressional Intent

The case before the Court is also distinguishable from *Brown & Williamson* based on the congressional intent. With respect to tobacco, Congress has made a conscious choice and "directly spoken to the issue." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Among other things, Congress "foreclosed the removal of tobacco products from the market," choosing instead to create "a distinct regulatory scheme focusing on the labeling and advertising of cigarettes and smokeless tobacco," and created an "express policy ... to protect commerce and the national economy while informing consumers about any adverse health effects. *Id.*

With PASPA, Congress also spoke directly on the issue before it, but decided to remove sports

gambling products from the market rather than follow the domestic tobacco model, or the UK sports gambling model, of "regulate, but warn."

Gambling supporters often claim that sports gambling integrity issues are exaggerated or that sport gambling can be remedied through proper monitoring. In that context, the UK is generally cited as a model country. The UK experiment is indeed instructive – but as a cautionary example. Recently, a soccer midfielder was discovered to have bet on 1,260 games over 10 years, busting the myth of the virtues of monitoring. http://www.bbc.com/sport/football/38421182. Shortly thereafter, the UK Football Association ended all sponsorship deals with betting companies, including terminating a long-term deal with Ladbrokes, one of the major sports betting operators. http://www.thedrum.com/news/2017/06/22/fa-ends-sponsorships-with-betting-firms-it-looks-move-beyond-gambling-controversy.

Congress made a conscious choice in 1992 by enacting PASPA and, despite the rhetoric, not much has changed since. That choice should be respected. The social ills of gambling are alive and well as much as they were when Congress enacted PASPA "to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime." Senate Report 102-248 (1991).

F. PASPA is an Extension of the Dual Regulatory Regime Governing Our Nation's Financial Markets and Therefore, State Law Is Preempted

PASPA does not make reference to securities and commodities laws. However, "[n]ot every silence is pregnant." *Burns v. United States*, 501 U.S. 129, 136 (1991) (quoting *Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)). "A court must ... interpret the statute 'as a symmetrical and coherent regulatory scheme,' and "fit, if possible, all parts into a harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (internal citations omitted). "Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Id.*, at 133. With or without the reference, PASPA is best understood as an extension of the dual regulatory regime that governs our nation's financial markets. The alternative, that PASPA is a stand-alone statute disconnected from the laws governing our nation's capital markets creates a disjointed and implausible result that would not create a "harmonious whole". *Id.*, at 133 (internal citations omitted).

Quite often, sports gambling, political election markets and box office contracts are mentioned in the same breath. "But what of *markets* listing contracts in attendance at movies, or political or legal events or in sporting events? [I]t is crucial that *market organizers or potential market organizers* are able to understand whether they are covered by CFTC requirements." Paul Architzel, *Event Markets Evolve: Legal Certainty Needed*, Futures Industry, March/April

2006 (emphasis added). "A small sampling of predictive market betting includes ... PredictIt, a real-money political prediction market, ... Hollywood Stock Exchange, which allows players to bet on actors, movies, and more, ... Smarkets, a United Kingdom-based online betting company which gained popularity for political bets and also ranges in sports and current events." The Report of the Special Commission to Conduct a Comprehensive Study Relative to the Regulation of Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports at 36 (July 31, 2017). Without a doubt, the CFTC has jurisdiction over political and box office contracts. Why should sports gambling be any different?

It is also noteworthy that integrity was a shared concern for both the CFTC and Congress in enacting the PASPA. "In the case of political event contracts, the CFTC evaluated how the proposed contracts impact the integrity of elections." *Order Prohibiting The Listing Or Trading of Political Event Contracts*, CFTC, April 2, 2012. Similarly, Congress enacted PASPA "to maintain the integrity of our national pastime." *Senate Report 102-248* (1991).

The historical and current case against sports gambling remains so clear-cut, that the Court should welcome Congress' occupation of the field through PASPA, which settles the matter by declaring sports gambling illegal instead of clogging the regulatory agency pipeline via delegation. Under PASPA, no purposeless sports gambling contract can be listed and traded. Thus, PASPA is part of the same regulatory regime that governs securities and

commodities, which is the very regime that preempts state law.[7]

Striking PASPA would lead to lopsided incentives and a disjointed result: creating a contract with *no* purpose would instantly become a better strategy than creating a product with *some* purpose. Stripping all purpose, hiding behind the veil of *state experimentation,* and pushing a narrative around jobs and tax revenues would become the dominant and obvious strategy. There will always be some States that want to be a laboratory after all. If this is how our society is incentivized, entrepreneurs will purposely strip purpose from their contracts and hope to keep dry under the State umbrella.

States are free to experiment, but cannot do so in financial markets. "The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71

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[7] Even the tangential matter of the grandfathering of certain states is reconcilable when PASPA is viewed through that lens. Volume matters, and the best evidence comes from CFTC: the agency was not comfortable with full-scale election markets but is comfortable with the exact same contract on a smaller scale. Similarly, with PASPA, Congress became comfortable with a limited amount of sports gambling. The only difference is the implementation channels: in the case of election markets, CFTC limited the volume through contract size, and under PASPA, Congress limited the volume through geographical limitations. In both cases, the *economic* outcome is the same: curbing excessive speculation. To the extent small-scale friends and family wagering is permissible under PASPA, it would reflect the same principle: volume matters.

(2006). Clearly, the same principal applies to commodities as well.

Congress gave federal financial regulators broad authority to regulate securities and commodities. Preemption in both fields is well established. The remaining issue is drawing the boundaries. This case is an ideal vehicle for delineating the boundaries because it involves a certain class of financial contracts, sports gambling, that sits at the purposeless edge of the market spectrum.

PASPA is not unconstitutional, and does not need to be redrawn in order to correct any apparent infirmities. Indeed, to the extent the Court considers PASPA to be problematic, the "sports gambling as markets view" advanced by *amicus curiae* provides a potential reconciliation. PASPA's language is, ultimately, one of the many ways the longstanding confusion around gambling vs. gaming may have manifested itself. In substance, however, PASPA is part of the dual federal regulatory regime that governs our nation's financial markets, and therefore a valid exercise of Congress under the Supremacy Clause.

CONCLUSION

For most people, sports gambling is arguably nothing more than "fun and games." It might be fun, but it is not a game.

This subtle, yet crucial insight leads to clear definitions for gambling and gaming, something that has arguably long eluded lawmakers, scholars and

other key stakeholders. These definitions, in turn, help place a clear wedge between games and markets. As to what constitutes gambling in either domain, clear regulatory frameworks already exist: skill vs. chance for the former, and purpose vs. entertainment for the latter.

More importantly for the dispute at issue, the responsibility to regulate each domain is entrusted to different governments: state governments for games and the federal government for markets, through clear preemption by Congress.

This case is distinguishable from *Brown and Williamson* in two key aspects. First, the regulatory agencies have signaled jurisdictional intent. Second, Congress recognized that the sports gambling market serves no purpose, and therefore banned it through PASPA.

Eliminating PASPA would burden the regulatory agencies and the judiciary, forcing them to deal with purposeless contracts which as shown above do not serve the public interest. Equally importantly, it would create lopsided incentives and incongruous results: creating a contract with *no* purpose would become a better strategy than creating a product with *some* purpose. Stripping all purpose and hiding behind the veil of *state experimentation* – while pushing a narrative around jobs and tax revenues – would become the obvious and dominant strategy for budding entrepreneurs and inventors, whose behaviors would most likely be welcome by *some* state, as New Jersey's persistence has shown.

The Court can prevent this inequitable and incongruous result by acknowledging that PASPA,

above all, is part of the regulatory regime that governs our nation's financial markets and holding PASPA to be a valid exercise of Congress under the Supremacy Clause.

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CHRISTOPHER J. CHRISTIE,
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Petitioners,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION, et al.,
Respondents.

NEW JERSEY THOROUGHBRED
HORSEMEN'S ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Question Presented

Is it constitutionally sporting for Congress to tell states what laws they can and cannot repeal?

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Interest of Amici

Pacific Legal Foundation (PLF), Competitive Enterprise Institute (CEI), Cato Institute (Cato), and Wisconsin Institute for Law and Liberty respectfully submit this brief amicus curiae in support of Petitioners, Governor Christopher Christie, David L. Rebuck, Frank Zanzuccki, New Jersey Thoroughbred Horsemen's Association, Inc, and New Jersey Sports & Exposition Authority.[1]

Founded in 1973, PLF defends limited government, property rights, and free enterprise in courts nationwide. PLF has extensive experience litigating constitutional and free enterprise issues as counsel and amicus curiae in this Court. *See, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (mem.); *Christie v. N.C.A.A.*, 134 S. Ct. 2866 (*cert. denied* June 3, 2014); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

CEI is a nonprofit 501(c)(3) organization incorporated and headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation. In the last decade, it has been extensively involved in the issue of federal gambling regulation, producing

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[1] Rule 37 statement: *Amici* have obtained the consent of all parties to file this brief. Letters evidencing such consent have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* funded its preparation or submission.

numerous studies and op-eds, and submitting testimony to congressional committees—all aimed at enhancing consumer freedom and reducing the prevalence of black markets.

Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Through education, litigation, and participation in public discourse, the Wisconsin Institute for Law & Liberty (WILL) seeks to advance the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society. Because these goals are undermined by the dissolving separation of powers among the branches of the federal government and among the federal and state governments, WILL operates the Center for Competitive Federalism, which seeks to advance the competitive federalism envisioned by our founders that respects the separate spheres of the federal and state governments and the limits imposed by our constitutional structure on both of them.

This case is of central concern to amici because the anti-commandeering doctrine is essential to preserving federalism and thereby individual liberty.

Introduction and Summary of Argument

"[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to [its] instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). Yet the federal Professional and Amateur Sports Protection Act (PASPA) dictates what states' own sports betting laws shall be. *See* 28 U.S.C. § 3702 (forbidding states from "authoriz[ing]" sports betting "by law"). The Constitution forbids Congress from commandeering the states whether by compelling them to enact a new policy or to continue enforcing an existing one long after it has proven ineffective, unpopular, or both. *New York*, 505 U.S. at 162.

That the states voluntarily adopted the sports betting bans that PASPA now compels them to maintain is irrelevant. Today, New Jersey officials and voters have no say in the state's own gambling laws. Federal law commands that those laws remain what they were 25 years ago, and state officials must continue to enforce them, because any reform would "authorize" sports betting. That separates this case from Congress' constitutional power to directly regulate individuals and to preempt conflicting state laws. Congress may give states a choice of regulating to federal standards or ceding the issue to federal control. But Congress cannot deny states that choice and simply dictate what their own laws shall be.

Allowing Congress to hijack states' law-making authority to prevent reform would undermine the two primary values underlying the anti-commandeering principle: federalism and political accountability. *New York*, 505 U.S. at 161-69. A loophole in the anti-commandeering principle would frustrate federalism

by allowing Congress to block state experimentation and innovation. And it would reduce political accountability by obscuring the politicians who should be held accountable if a policy proves ineffective, unpopular, or worse. For those reasons, this Court should reverse the Third Circuit and hold that PASPA unconstitutionally commandeers the states.

Argument

I.

The Constitution Forbids the Federal Government from Commandeering States

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). This system, federalism, provides decentralized government "sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* at 458; *see* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987).

A. The Anti-Commandeering Principle Protects Federalism, the Political Process, and Liberty

To preserve federalism, the Constitution forbids Congress from "commandeering" the states, either by requiring states to adopt a policy or by compelling state officials to implement it. *See Printz v. United States*, 521 U.S. 898, 927-28 (1997); *New York*, 505

U.S. at 161; *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981). This Court has twice struck down federal laws under this principle. In *New York*, it declared unconstitutional a federal law purporting to require states to either regulate nuclear waste disposal according to federal standards or accept possession of it. 505 U.S. at 169-70. And in *Printz*, this Court invalidated a federal law requiring state officials to perform background checks for prospective gun sales. 521 U.S. at 933-35.

Together, these cases establish that states alone set state policy and the federal government sets federal policy; Congress can no more dictate what state policy shall be than the states can dictate policy to Congress. *See id.* at 918-28. Absent this constitutional restraint, the federal government could enlarge its power immeasurably by pressing the states and their officers into service at no cost to itself. *See id.* at 922. That would threaten federalism, the political process, and, most importantly, liberty. *See id.* at 918-28.

Commandeering would threaten federalism by converting states from independent sovereigns into instrumentalities of the federal government. The Framers consciously rejected such a system, after seeing the problems it created under the Articles of Confederation. *See id.* at 919-20; The Federalist No. 15, at 109 (Alexander Hamilton) (J. Cooke ed., 1961). "[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York*, 505 U.S. at 166. States cannot be "reduce[d] . . . to puppets of a ventriloquist Congress." *Brown v. E.P.A.*, 521 F.2d 827, 839 (9th Cir. 1975). Preserving state autonomy

from federal encroachment allows states to discover better public policies through experimentation. *See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Federal commandeering, on the other hand, threatens to impose one-size-fits-all policies on states and stifle innovation. *See* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563, 1581 (1994) ("To put it bluntly, we need long-term sources of regulatory creativity more than we need short-term efficiency.").

Commandeering also undermines the political process by obscuring the officials who are responsible for a given policy. *See* 505 U.S. at 182-83. If it were permissible, state officials might take the fall for unpopular policies over which they have no control. Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. Rev. 1, 8 (2015). Likewise, federal politicians could claim credit for addressing a serious problem while foisting the difficult questions of how to do so and at what cost onto state officials. *Id.*; *see also* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2201 (1998). "The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring).[2]

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[2] Because federalism violations undermine the political process, political safeguards are insufficient to protect federalism on their own. Courts must intervene when the federal government violates the Constitution's structural protections for federalism.

Finally, federal commandeering of states undermines federalism's protection of individual liberty. *Printz*, 521 U.S. at 921; *see also Gregory*, 501 U.S. at 459; The Federalist No. 51, at 323 (James Madison). Although it might seem counterintuitive, "freedom is enhanced by the creation of two governments." *Alden v. Maine*, 527 U.S. 706, 758 (1999). "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222 (2011). Commandeering, however, encourages further expansion of federal power, by allowing federal officials to avoid the costs and political repercussions of their policy choices. *See Printz*, 521 U.S. at 930. As the federal government grows and state autonomy shrinks, our liberty is diminished.

B. The Federal Government Can Enforce Its Chosen Policies Without Commandeering the States

The anti-commandeering principle does not limit *what* the federal government can do, only *how* it may do it. Consequently, this Court has steadfastly refused to balance the principle against short-term political expediency. "*No matter how powerful the federal interest involved*, the Constitution simply does not give Congress the authority to require the States to

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See Gregory, 501 U.S. at 460-61; John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 1311, 1404 (1997). "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

regulate." *New York*, 505 U.S. at 178 (emphasis added). "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id.* at 187.

The Court should continue to adhere to that hard line. The federal government has plenty of options to address pressing issues without eroding the Constitution's structural protections. It can directly regulate the activity itself and preempt contrary state regulation. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000). It can give states a choice of cooperating or ceding an area to federal regulation—so-called "conditional preemption." *See New York*, 505 U.S. at 167-68. Or it can use its spending power, under appropriate circumstances, to entice states to cooperate, provided that it does not cross the line between encouraging state participation and coercing it. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578-79 (2012).

This Court has carefully distinguished laws that unconstitutionally commandeer the states from Congress' preemption power. *New York*, 505 U.S. at 160. Preemption is constitutional because "'if a State does not wish'" to participate "'the full regulatory burden will be borne by the Federal Government.'" *Id.* at 161 (quoting *Hodel*, 452 U.S. at 288). Congress can incentivize states to cooperate with it, but states must have the option to decline participation. *See* Ernest Young, *Federalism as a Constitutional Principle*, 83 U. Cin. L. Rev. 1057, 1074 (2015) ("Congress must *persuade*, not command, States to participate in

cooperative federalism schemes."). If the state may withdraw from the issue and let "the full regulatory burden" fall on the federal government, it has not been commandeered. *New York*, 505 U.S. at 161 (quoting *Hodel*, 452 U.S. at 288). If the state does not retain this right, however—if it must embrace some policy chosen by Congress—it has been unconstitutionally commandeered.

II.

Congress Cannot Constitutionally Forbid States from Repealing or Amending Their Own Laws

"[P]reventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). Either way, the federal government dictates what state law shall be, leaving states no right to refuse to participate in the federal policy. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 578-79 (interpreting *New York* as recognizing a state right of refusal to participate in any federal scheme). This Court has already rejected the argument that the anti-commandeering principle is limited to when the federal government affirmatively requires a state to enact a new policy. *See Printz*, 521 U.S. at 927-28 (the anti-commandeering principle does not distinguish between a requirement that a state affirmatively enact a policy and a requirement that it implement or enforce one). It should do so again here. A federal power to forbid states from amending or repealing their own laws poses the same federalism and political

accountability problems that have previously concerned this Court.

A. A Federal Power To Prevent States from Reforming Their Own Laws Would Undermine Federalism

Allowing the federal government to forbid states from amending their own laws would undermine federalism by blocking state experimentation and innovation. If many states have similar laws on an issue but one or more of them are considering reform, Congress could simply forbid states from "authorizing" any activity currently forbidden. It is impossible to predict what policy innovations such a regime might sacrifice. But recent state efforts to take advantage of the benefits of federalism give some indication.

For instance, if Congress could forbid states from amending their own laws, the ongoing federalism revolution in marijuana policy may never have happened. Over the last decade, several states have experimented with decriminalizing or legalizing marijuana, notwithstanding the continuing federal criminal prohibition. *See* Erwin Chemerinsky, et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 81-89 (2015). This federalism revolution has only been possible because "the federal government cannot require states to enact *or maintain on the books* any laws prohibiting marijuana." *Id.* at 102-03 (emphasis added); *see* Austin Raynor, *The New State Sovereignty Movement*, 90 Ind. L.J. 613, 626 (2015); Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. Colo. L. Rev. 1105, 1107 (2014).

State-level reform does not bar the federal government from enforcing federal policy, of course. However, the results of state experimentation can inform both the federal government and other states. Many states have followed their neighbors' lead and reformed their laws. *See* Jacob Sullum, *Victories for Eight of Nine Marijuana Initiatives Hasten the Collapse of Prohibition*, Reason.com (Nov. 9, 2016)[3] (voters in eight more states legalized recreational marijuana in the 2016 elections). And Congress has forbade prosecution under federal law of any individual who possesses marijuana pursuant to these state reforms. *See* Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015); *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016) (forbidding federal prosecutions for activity permitted by state law). If the federal government could forbid this reform experiment, states would not have had the breathing room to pursue this effort, depriving other states and the federal government of the benefit of seeing the results of the experiment.

Limiting the anti-commandeering principle to save PASPA would not only threaten marijuana or gambling reform, it could block any sort of state-level reform that federal politicians, rightly or wrongly, may oppose. The federal government could forbid states from authorizing state officials not to participate enforcing federal immigration laws. *See* Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 Yale L. & Pol'y Rev. 87 (2016). Congress could prevent

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[3] http://reason.com/blog/2016/11/09/victories-for-eight-of-nine-marijuana-in.

the further spread of right-to-work laws or, if those laws someday prove unwise, require states to maintain them anyway. *Cf.* Richard Vedder & Jonathan Robe, *The High Cost of Big Labor: An Interstate Analysis of Right to Work Laws*, Competitive Enterprise Institute (2014).[4] It could forbid states from increasing gun control or relaxing existing gun regulations. *See Printz*, 521 U.S. at 933-35. It could forbid states from modifying school curricula or testing requirements. *But see Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). And Congress could block states from altering controversial bathroom policies in light of local debates over social norms. *Cf. G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016).

If this Court were to create a loophole in the anti-commandeering principle, it would also likely impact "cooperative federalism" arrangements, in which the federal government and states cooperate to develop and implement a federal policy. *See* Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. Envtl. L.J. 179 (2005). In environmental policy, for instance, these arrangements often involve Congress setting a federal standard that states agree to implement. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1243-50 (1977). These arrangements can themselves be coercive. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 575-89 (Congress can encourage state cooperation but

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[4] *Available at* http://cei.org/sites/default/files/Richard%20Vedder%20and%20Jonathan%20Robe%20-20An%20Interstate%20Analysis%20of%20Right%20to%20Work%20L.

cannot use an inducement so strong that it becomes coercive); Mario Loyola & Rick Esenberg, *Shining a Light on Coercion in Federal "Assistance" to States: A Model Policy for Resisting Federal Coercion*, WILL Report, July 2016.[5] Even if kept within their proper scope, giving Congress free reign to forbid states reforming their own laws would make cooperative federalism arrangements far more treacherous. Any state that voluntarily agreed to cooperate at one time could find itself coerced into enforcing a costly, ineffective, or unpopular policy forever, if Congress forbade subsequent state reform. This would obviously discourage state participation, undermining benefits that can be derived from cooperative federalism.

B. A Federal Power To Forbid State Reform Would Frustrate Political Accountability

A federal prohibition against states amending their own laws poses the same political accountability concerns as a federal requirement that states affirmatively enact a policy. *See New York*, 505 U.S. at 168-69. In either case, federal politicians can ensure the continued enforcement of their preferred policies while avoiding political consequences. *See Printz*, 521 U.S. at 930 ("Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."). Federal politicians would be shielded from the backlash if the policy proves wrongheaded, unpopular, or too expensive. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88

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[5] *Available at* http://www.will-law.org/wp-content/uploads/2016/07/Resist-FInal.pdf.

Colum. L. Rev. 1, 61-62 (1988). Instead, state politicians will suffer the fallout. *See Printz*, 521 U.S. at 930; *see also Three Faces of Federalism*, *supra* at 1580 n.65. These incentive effects are the same whether a state's initial adoption of the policy was voluntary or not.

Accountability would be reduced at the state level also because a federal bar against state reform will neuter the impact of state voters punishing state politicians for existing policies. *See New York*, 505 U.S. at 168-69. State officials should rightly be held accountable for the policies they enact, including when they choose to participate in cooperative federalism arrangements that prove unpopular or unwise. *See id.* at 168. But where a politician has no choice because federal law dictates that a policy must be maintained, any votes cast in disapproval of that policy are wasted. Yet, if a policy is written into state law and enforced by state officials, voters will understandably mistake it as a state policy and vote accordingly. This case furnishes an example: New Jersey voters approved a referendum by an overwhelming 2-to-1 margin calling for the reform of the state's sports gambling laws. *See New Jersey Voters Endorse Making Sports Betting Legal*, Chicago Tribune, Nov. 8, 2011.[6] The voters apparently acted on the mistaken belief that the state had a say in its own laws.

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[6] *Available at* http://articles.chicagotribune.com/2011-11-08/sports/chi-new-jersey-voters-endorse-making-sports-betting-legal-20111108_1_amateur-sports-protection-act-legal-bets-oregon-and-montana.

These accountability concerns should not be dismissed lightly. Although it is easy to presume that voters will recognize when the federal government is dictating policy to states, that presumption rests on a too cheery view of politics. In reality, politics is defined by widespread political ignorance. *See* Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter* (2013); Frank Bruni, *America the Clueless*, N.Y. Times, May 11, 2013.[7] This ignorance extends to basic civics. A 2006 poll found that only 42 percent of Americans can name all three branches of government established by the Constitution. *See* Ilya Somin, *Political Ignorance in America, in The State of the American Mind: 16 Leading Critics on the New Anti-Intellectualism* 163 (2015).[8] Most Americans cannot name a single member of this Court, even though surveys show that an overwhelming majority (more than 90 percent) believe that its decisions affect their daily lives. *See* Robert Green & Adam Rosenblatt, C-Span/PSB Supreme Court Survey (2017).[9]

Pervasive political ignorance is a rational response to incentives and the incomprehensible size of modern government. *See Democracy and Political Ignorance, supra* at 61-89. The chances that any one person's vote will impact an election, much less a

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[7] *Available at* http://www.nytimes.com/2013/05/12/opinion/sunday/bruni-america-the-clueless.html.

[8] *Available at* http://www.soamcontest.com/sites/default/files/201603/Somin-%20Political%20Ignorance%20in%20America.pdf.

[9] *Available at* https://static.c-span.org/assets/documents/scotusSurvey/CSPAN%20PSB%20Supreme%20Court%20Survey%20COMPREHENSIVE%20AGENDA%20sent%2003%2013%2017.pdf.

particular policy issue, is statistically insignificant, roughly the same as being struck by lightning. *See* Andrew Gelman, *What Are the Chances Your Vote Matters?*, Slate (Nov. 7, 2016);[10] National Weather Service, *How Dangerous is Lightning?*, NOAA.gov.[11] In a world where attention is at a premium, anything that blurs which government officials are responsible for a policy reduces voters' ability to hold the responsible officials accountable. Forbidding the federal government from depriving states of a choice in what their own laws are would make the responsibility clearer and improve accountability. If the federal government wishes to see a policy maintained, it must either induce states to participate, subject to political checks, or enforce the policy itself, in which case it faces the political backlash directly.

By preserving political accountability, the anti-commandeering principle aligns government with the preferences of the governed and creates incentives for states to find better, smarter ways to promote the public interest, without necessarily favoring more or less government. Like federalism generally, the anti-commandeering principle favors neither conservative nor liberal results, and should enjoy bipartisan support. *See* Heather K. Gerken, *A New Progressive Federalism*, Democracy (2012);[12] Heather K. Gerken, *Foreword: Federalism All The Way Down*, 124 Harv.

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[10] *Available at* http://www.slate.com/articles/news_and_politics/politics/2016/11/here_are_the_chances_your_vote_matters.html.

[11] *Available at* http://www.lightningsafety.noaa.gov/odds.shtml.

[12] *Available at* http://democracyjournal.org/magazine/24/a_new_progressive_federalism.

L. Rev. 4, 44-55 (2010); Robert D. Alt, *Is Federalism Conservative?*, Nat'l Rev., Apr. 29, 2003.[13] Consequently, all should be concerned about the risks of creating an easily manipulated loophole in this core constitutional protection.

C. PASPA Forces States To Regulate Activity That They Would Prefer To Leave Unregulated

By forbidding states from amending their own sports betting laws, PASPA dictates to states what their own laws must be and, therefore, violates the anti-commandeering principle.

As mentioned above, New Jersey voters have emphatically rejected the state's sports betting ban. For good reason: it has failed. The last 25 years have seen the dramatic growth of the black market for sports betting. *See* Press Release, American Gaming Association, *Americans to Bet $4.2 Billion on Super Bowl 50* (Jan. 27, 2016)[14] (nearly 97 percent of sports bets, worth more than $100 billion are wagered illegally); National Gambling Impact Study Commission, *Final Report* (June 1999)[15] (between $80 billion and $380 billion in illegal sports bets are placed annually). The size of this illegal market also makes it more difficult for states to investigate and prosecute truly bad actors. *See* Dr. David Forrest & Rick Parry, *The Key to Sports Integrity in the United*

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[13] *Available at* http://www.nationalreview.com/article/206732/Federalism-conservative-robert-d-alt.

[14] https://www.americangaming.org/newsroom/press-releases/americans-bet-42-billion-super-bowl-50.

[15] https://babel.hathitrust.org/cgi/pt?id=pur1.32754071462216.

States: Legalized, Regulated Sports Betting (Sept. 27, 2016).[16]

PASPA deprives states of their sovereign power to define their own laws according to their voters' wishes. The Third Circuit's interpretation of "authorize . . . by law" leaves no room for state legislatures or executive officials to change policy. If the legislature's repeal of the sports-betting prohibition at casinos and racetracks violates PASPA, what about an executive enforcement policy that does the same thing? A public enforcement policy that forbids the use of state resources to investigate and punish bets placed at casinos and racetracks has the same effect as the law at issue here. So does legislation or an enforcement policy that focuses on protecting the young, the elderly, and known gambling addicts, or bets placed under circumstances that suggest coercion. Simply put, PASPA compels states to maintain, forever, the sports gambling laws they enforced in 1992. Daniel L. Wallach, *Daily Fantasy Sports and PASPA: How to Assess Whether the State Regulation of Daily Fantasy Sports Contests Violates Federal Law, in The Oxford Handbook of American Sports Law* (forthcoming 2017) (explaining that PASPA has created confusion whether states can adopt new regulations for daily fantasy sports).

PASPA is readily distinguishable from a constitutionally permissible preemption statute. Unlike a preemption statute, PASPA announces no federal policy on sports betting. "[T]here is no federal scheme regulating or deregulating sports gambling by

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[16] https://www.americangaming.org/sites/default/files/research-files/FINAL%20SPORTS%20INTEGRITY%20REPORT.pdf.

which to preempt state regulation. PASPA provides no federal regulatory standards or requirements of its own." *See N.C.A.A. v. Governor of New Jersey*, 730 F.3d 208, 247 (3d Cir. 2013) (Vanaskie, J., dissenting).

Instead of announcing a federal standard, and facing the political consequences that would come with it, Congress chose to force states to bear these burdens. This also distinguishes PASPA from a preemption statute. The defining characteristic of preemption statutes is that states retain the option to refuse to participate, at which point enforcement falls to the federal government. *See supra* Part I.B. PASPA denies New Jersey this option. The decision below does not withdraw the state from regulating sports gambling. Instead, it reinstates the rejected state ban, which the state must once again enforce. Under PASPA, the states bear "the full regulatory burden" of prohibiting sports betting, not Congress. *See New York*, 505 U.S. at 161 (quoting *Hodel*, 452 U.S. at 288).

In past commandeering cases, this Court has highlighted the novelty of the statutes at issue. *See Printz*, 521 U.S. at 925. PASPA is also unique in that it regulates the states rather than individuals, and discriminates among them. Congress could not accomplish the result it seeks through PASPA by regulating individuals directly. According to the original meaning of the Commerce Clause, Congress must regulate uniformly among the states. *See* Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 Va. L. Rev. 249, 273 (2005); Nelson Lund, *The Uniformity Clause*, 51 U. Chi. L. Rev. 1193, 1212 (1984). Like the Equal Sovereignty doctrine, it forbids Congress from discriminating among the states as states. *See Shelby*

County, Ala. v. Holder, 133 S. Ct. 2612 (2013) (fundamental principle of equal sovereignty limits Congress' ability to regulate some states differently from others); *see also id.* at 2649 (Ginsburg, J., dissenting) (questioning PASPA's constitutionality under *Shelby County*).

Ultimately, the only thing that distinguishes this case from *New York* is that, more than a quarter century ago, state politicians approved of the sports betting bans that PASPA now compels the states to maintain. From the perspective of present politicians and voters, the impact of PASPA and the law at issue in *New York* is precisely the same. A state's past endorsement of a policy should not change the court's analysis under the anti-commandeering principle. *See New York*, 505 U.S. at 182 ("[T]he departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").

Conclusion

Congress cannot command states to adopt or enforce its preferred policy. That's precisely what PASPA does by requiring states to maintain (and thus continue enforcing) sports betting prohibitions long after the states and their voters have rejected them. Allowing Congress to forbid states from reforming their own laws would threaten federalism values and political accountability. Therefore, this Court should reject the invitation to create a loophole in the anti-

commandeering principle, reverse the decision below, and hold that PASPA is unconstitutional.

DATED: August, 2017.

Respectfully submitted,

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RECORD AND BRIEFS

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IN
THE
SUPREME COURT of the UNITED STATES

GOVERNOR CHRISTOPHER J. CHRISTIE, et al.,

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.

Petitioners.

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF CONGRESSMAN FRANK J. PALLONE, JR. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus represents the Sixth District of the State of New Jersey in the U.S. House of Representatives and has served as a Member of Congress and the House Committee on Energy and Commerce for 15 full terms (29 years) and 24 years, respectively. Prior to being elected to Congress, Amicus served in the New Jersey Senate within the New Jersey Legislature for five years from 1982-88. Drawing on his experience and research, Amicus may have a few worthwhile thoughts and considerations to offer the Court as it deliberates this matter.[2]

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part, and no person, other than amicus or their counsel, made any monetary contribution to preparing or submitting this brief. Petitioners and Respondents have consented to the filing of amicus curiae briefs, in support of either party or of neither party.

[2] PASPA, in the form of Senate bill S. 474, was reported in the Senate on November 26, 1991. The House of Representatives took up the bill and passed it under suspension of the House rules in October 1992. The legislation was signed into law by President Bush on October 28, 1992.

Amicus is the Ranking Member of the House Committee on Energy and Commerce. House of Representatives Rule X grants jurisdiction to that Committee generally over matters pertaining to the Commerce Clause and legislation affecting or affected by interstate commerce and the Commerce Clause.[3] Of the numerous state and federal bills and legislation that Amicus has introduced, debated, and voted on is the Professional and Amateur Sports Protection Act (PASPA).

INTRODUCTION AND SUMMARY OF ARGUMENT

On November 8, 2011, slightly more than one million of New Jersey's citizens voted on a constitutional ballot question to legalize sports betting within the State. Sixty four percent of these people, including Amicus, voted to amend the Constitution of the State of New Jersey to allow our New Jersey Legislature to permit gambling at Atlantic City casinos

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[3] House Rule X, cl. 1, sec. 5(f) (2017) (House Committee on Energy and Commerce Committee jurisdiction includes "interstate and foreign commerce generally.")

as well as at current and former horse and harness racetracks.[4]

2012 Sports Wagering Law

Promising beginnings in effectuating the will of New Jersey's citizens were quickly met by opposition from the major professional sports leagues ("the sports leagues") and the National Collegiate Athletic Association ("NCAA"). Not long after the New Jersey Legislature passed the 2012 Sports Wagering Law ("2012 Law"), respondents sued petitioners in federal district court charging petitioners with violating PASPA. The 2012 Law legalized and regulated sports gambling at State casinos and racetracks for individuals twenty-one and older.

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[4] *New Jersey Sports Betting Amendment, Public Question 1* was the lone ballot question put before the New Jersey voters in the 2011 general election. Political ballot questions and referenda to legalize or socialize certain areas of private conduct, such as gambling, can be highly controversial. These areas are likely to evoke strong feelings and emotions among some constituent groups and single-issue voters. Given that intensity, positions and policies taken by politicians, political parties, and governments on these sorts of questions can affect the views of voters and sway or possibly change state and federal campaigns and election outcomes.

The sports leagues and the NCAA petitioned the district court to enjoin the State from putting the 2012 Law into effect. The district court agreed with the complainants and granted their motion, finding that such betting would irreparably harm the reputations and commercial values of the sports leagues and the NCAA.

Following an unfavorable appeal of the district court's injunctive order before a divided (2-1) Third Circuit panel ("*Christie I*"), appellants petitioned for certiorari to this Court, which denied appellants' request on June 23, 2014.

2014 Repeal Law

The New Jersey Senate and Assembly went on to pass overwhelmingly a second sports wagering law in 2014 ("2014 Repeal Law"), which the Governor signed into law on October 17, 2014.

The State of New Jersey understood that the federal policy behind PASPA strictly opposed State imprimatur or sponsorship of sports betting operations and schemes. In response to this knowledge and the lessons it took from

Christie I, the New Jersey Legislature tailored the 2014 Repeal Law to preserve the federal policy and avoid conflicting with PASPA's provisions. The 2014 Repeal Law partially repealed all State laws and regulations prohibiting sports wagering "to the extent they apply or may be construed to apply [to sports wagering]" at Atlantic City casinos and gambling houses or New Jersey running or harness horse racetracks by persons 21 years and older. The 2014 Repeal Law also repealed New Jersey laws governing civil and criminal penalties for gambling. Like the 2012 Law, the 2014 Repeal Law excluded "collegiate sports contest[s] or collegiate athletic event[s] that take [] place in New Jersey or. . .sport contest[s] or athletic event[s] in which any New Jersey college team participates."

The sports leagues challenged the 2014 Law—again, they filed a motion for a temporary restraining order and a preliminary injunction against State petitioners to prevent commencement of sports wagering at Monmouth Park. The district court granted the TRO motion in October 2014.

Petitioners appealed the district court's second injunctive order before

another Third Circuit panel ("*Christie II*"). The Christie II panel affirmed the district court on a divided 2-to-1 vote.

Petitioners applied to the Third Circuit to rehear the case *en banc*, and the appeals court granted their request. Sitting *en banc*, the Third Circuit Court of Appeals affirmed the injunctive remedy ordered by the district court by a 9-to-3 vote. That command illegally compelled the State of New Jersey to reinstate former State laws prohibiting sports wagering.

A Congressional command that penetrates state government and disables one of a legislative body's core powers is dangerous to our democracy and federalism. The Framers of our Constitution tried mightily to make clear and certain that it was neither the Federal Government's right nor its role to commandeer the States--certainly not by usurping a State's sovereignty and autonomy over state legislative and policy-making functions.

Intrusive orders from the Federal Government to the States cheapen and discredit the Federal Government's guarantee to the States under the Tenth Amendment. These commands are like

invisible wires that can tug and trip the State governments. As they stumble or from these outside pressures and maneuvers, they appear inept and misaligned with their electorates and constituents. This can lead many of a State's citizens puzzled and wondering if these leaders can capably serve their interests.

The Third Circuit's precedent was earnestly reasoned, but more direction from the Court is greatly needed. Here is an occasion for the Court to go past calling balls and strikes. To mend our Republic Amicus would ask that you ensure that the scoreboards are operable and the fields and courts of intergovernmental play are in fair and playable condition before having the State of New Jersey take up the field one final time.[5]

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[5] Pet. App. 158a ("we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering.", *Christie I*) (Fuentes, J.).

ARGUMENT

I. THE 2014 REPEAL LAW DOES NOT VIOLATE PASPA

a. State Petitioners Do Not "Authorize [Sports Wagering Schemes] By Law or Compact" Under the 2014 Repeal Law

The Court could easily get to and through the Tenth Amendment question presented without revisiting the rulings below as to whether the 2014 Repeal Law is the sort of authorization that PASPA prohibits. But, the Third Circuit Court of Appeal's broad construction of PASPA's preemptive scope, compounded by its even broader definition of the phrase "authorized by law or compact" should be revisited on appeal.[6] Amicus thereby requests the Court's indulgence to offer briefly some perspectives on the

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[6] State constituents generally expressed their support for the ballot question in terms of the prospects for new state legislation to enhance state revenues and improvements or accelerate state economic development leading to sizable employment gains and revitalization of state commerce in the casino gaming, hospitality, horse racing, and tourism industries.

authorization issue, and about PASPA's true preemptive scope.[7]

PASPA lacks a definition for the key statutory phrase – "authorize by law or compact." Though PASPA contains plain language, it is not entirely unambiguous. Therefore, Amicus respectfully urges the Court to exercise care in relying purely or predominantly on a textual analysis of PASPA's language.[8]

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[7] The Constitution presumes that agreements or compacts between States cannot be formed without prior, affirmative Congressional approval. Since all powers that are not enumerated are reserved to the states, there is no listing of state powers in the Constitution; Art. I, clause 10 of the Constitution does list, however, classes of state laws and actions that states are prohibited from doing absolutely, or "[w]ithout the Consent of Congress[]" or Congressional pre-approval. U.S. Const., Art. I, cl. 10.

[8] If the Court were to base its decision in this case – unanimous or otherwise – on a textual analysis of PASPA, Amicus respectfully advances that it should opine on the statutory text and not consider exogenous matters, such as the likelihood of some domino effect occurring across other States were the Court to rule in favor of petitioner(s), or .a State official or unit having standing would sue a State defendant under Section 3703 for violating PASPA. *Cf.* Br. of Resp. in Opp. to Pet. for Cert. at 21 ("As noted

Going beyond a textual analysis to look into PASPA's legislative history reveals that a less conspicuous purpose for enacting the law could have been to incentivize (and perhaps shield) State enforcement officials (from criminal liability) to continue to enforce PASPA against other States and State officials. *See* Professional and Amateur Sports Protection Senate Report No. 102-248 (1991) ("Gambling and lotteries are *already* subject to Federal regulation and this legislation is meant to be consistent with and to clarify existing Federal law and policy...Senate bill 474 is, among other things, an effort to more effectively enforce the Federal policy embodied in title 18. Without this legislation, the Justice Department cannot enforce the law without utilizing criminal prosecutions of State officials.") (emphasis added); H.R. 74, Professional and Amateur Sports Protection Act: Hearing before House Subcommittee on

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PASPA has spawned just five cases and four appellate opinions in its more than two decades on the books—[A]nd in the 24 years since its enactment, states have expressed little or no concern about PASPA, let alone about its constitutionality.").

Economic and Commercial Law, 102nd Congress, Statement of NFL Comm'r. Paul Tagliabue 18 (1991) ("H.R. 74 is [a]n effort to more effectively enforce the federal policy embodied in these provisions of Title 18. Without the legislation, the Justice Department cannot enforce the law without utilizing criminal prosecutions of state officials.")

Including States and State officials in the definition of "governmental entity" to reduce their exposure might have been an approach for accomplishing that.[9]

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[9] There is an oddity in the statute for which the legislative intention and purpose are not altogether apparent. Seeing that a "governmental entity" can also be either a professional or amateur sports organization under their respective definitions in 28 U.S.C. §§ 3701(1),(2), a State or a political subdivision of a State could sue the State or another state subdivision for injunctive relief under 28 U.S.C. §§ 3703. This cannot easily be chalked up as a drafting error; the companion bill in the House, H.R. 74 in the 102d Congress, did not incorporate "governmental entity" into the definition of either a "professional" or an "amateur sports organization". It also did not contain a definition for 'governmental entity.' These definitions originated in the Senate version (S. 474) of the legislation, which is the bill text that Congress passed into law. Regardless of the reasons, the

The 2014 Repeal Law carefully modified and repealed State sports betting prohibitions and restrictions so as not to conflict with PASPA's negative requirements. The Repeal law permits sports wagering to occur at certain venues but stops short of affirmatively authorizing or licensing the State or some other 'governmental entity,' or a 'person' to engage in conduct prohibited by PASPA.[10] The fact that Congress did not fill-in all of the blanks to clarify or delimit "authorization" in some way, should not be taken to include State legislative actions that technically and legally speaking are not authorizations, such as the passage of repealers or repeals legislation.[11]

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manner in which PASPA's terms, "professional" and "amateur sports organizations" are defined potentially pose future litigation scenarios that could violate state sovereignty, worsen political accountability, impair political process, and intensify conflicts-of-interest and already present federal/state judiciary venue concerns.

[10] *See* 28 U.S.C. §3702.

[11] Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983) (" '[i]t would be a mistake to conclude that all "lapses" of completeness and specificity result from oversights...Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed,

In addition, PASPA's very structure in relation to how other similarly crafted bills and statutes were drafted is revealing. Focusing specifically on statutes found in Title 28 of the U.S. Code, and some other statutes passed roughly contemporaneously with PASPA,[12] there have been more than a

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to leave certain issues unresolved...What matters to the compromisers is reducing the chance that their work will be invoked subsequently to achieve more, or less, than they intended, thereby upsetting the balance of the package.' ").

[12] Statutes enacted roughly contemporaneously with PASPA also use the term "authorize" to refer to an affirmative act. The following statutes were enacted in the same year as PASPA. *See, e.g.*, 12 U.S.C. § 522 (providing that "[n]o Federal Reserve bank may *authorize* the acquisition or construction of any branch building . . . without the approval of the Board.") (emphasis added); 16 U.S.C. § 4911 (providing that "[n]otwithstanding any prohibition, suspension, or quota under this chapter on the importation of a species of exotic bird, the Secretary [of the Interior] may, through the issuance of import permits, *authorize* the importation of a bird of the species if the Secretary determines that such importation is not detrimental to the survival of the species and the bird is being imported exclusively" for certain purposes) (emphasis added); 42 U.S.C. § 2991b-3(f)(2)(D)(iii) (providing that another provision "shall not be construed to *authorize* Indian tribes . . . to limit

dozen instances total in which the phrase "authorize by law" or some variation of "authorize" has been used by Congress to denote an affirmative act or action (such as licensing or the granting of special permission).[13] *See generally*

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the access of the Secretary [of Health and Human Services] to such products [produced pursuant to certain grants] for purposes of administering this section or evaluating such products . . .") (emphasis added).

[13] *See, e.g.*, 28 U.S.C § 335(a) (providing that "[t]he chief judge of the Court of International Trade is *authorized* to summon annually the judges of such court to a judicial conference, at a time and place that such chief judge designates, for the purpose of considering the business of such court and improvements in the administration of justice in such court.") (emphasis added); 28 U.S.C. § 509B(b) (providing that the Attorney General shall establish a section within the Criminal Division of the Department of Justice with responsibility for the enforcement of laws against suspected participants in serious human rights offenses, and that such section "is *authorized* to . . . take appropriate legal action against individuals suspected of participating in serious human rights offenses" and "coordinate any such legal action with the United States Attorney for the relevant jurisdiction.") (emphasis added); 28 U.S.C. § 628 (providing that "there are... *authorized* to be appropriated such sums as may be necessary to carry out the provisions of this chapter [concerning the Federal Judicial Center].") (emphasis added); 28 U.S.C. § 1345

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (holding that Office of Federal Contract Compliance Programs regulations did not constitute "authoriz[ation] by law" within the meaning of the Trade Secrets Act's prohibition on the disclosure of certain information "to any extent not authorized by law" because the relevant regulations were not promulgated in accordance with the rulemaking requirements of the Administrative Procedure Act and because there was no nexus between the regulations and a congressional delegation of authority);

(providing that "[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly *authorized* to sue by Act of Congress.") (emphasis added); 28 U.S.C. § 3003(c)(7) (providing that a chapter concerning federal debt collection procedures "shall not be construed to supersede or modify the operation of . . . any Federal law *authorizing*, or any inherent authority of a court to provide, injunctive relief . . .") (emphasis added); 28 U.S.C. § 3009 (providing that "[w]henever a United States marshal is *authorized* to seize property pursuant to this chapter, the United States marshal may designate another person or Federal agency to hold for safekeeping such property seized.") (emphasis added).

EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) (holding that the phrase "to the extent authorized by law" in a provision of Title VII of the Civil Rights Act of 1964 "encourag[ing]" alternative dispute resolution "[w]here appropriate and to the extent authorized by law" refers to *current* case law interpreting Title VII and the Federal Arbitration Act, rather than case law as it existed when the relevant provision was drafted); *International Society for Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978) (holding that a local regulation providing that "[p]ersons authorized by law to distribute literature, or solicit contributions may do so only in public areas of Chicago airports" was void for vagueness, regardless of whether the phrase "authorized by law" was interpreted as referring to (1) persons registered to distribute literature or solicit contributions or (2) persons "who are doing what is permissible under the law in general.").

b. PASPA Does Not Expressly Preempt All State Action

It would be wrong to argue that sports wagering is not pre-emptible

conduct under the Commerce Clause. It clearly is.

But, any assertion that Congress meant for PASPA to preempt the entire field of sports wagering is erroneous and baseless. *See* Pet. App. At 78a ("This case requires the court to determine whether New Jersey's recent attempt to do indirectly what it could not do directly—bring sports wagering to New Jersey in a limited fashion—conflicts with PASPA.") (Shipp, J.). Congress clearly did not mean to do so.

Knowing that States have concurrent and historic police powers to regulate gambling, the Court must not conclude that Congress intended to foreclose States from playing a regulatory role. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (" '[i]n all pre-emption cases, [p]articular[y] in [w]hich Congress has 'legislated. . .in a field which the States have traditionally occupied,' [courts] 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "). *See also CTS Corp. v.*

Waldburger, 134 S. Ct. 2175, 2188-2189 (2014) (citing *Medtronic, Inc.* quotations omitted) (Kennedy, J.); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (Douglas, J.).

Despite that in both *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997) the requirements imposed on the States were affirmative, not negative; and securing radioactive waste disposal probably ranks higher as a matter of national concern and interest than prohibiting sports betting, the subject of Federal preemption could not eclipse the coercive choice that was put to the State of New York and its electorate. *New York v. United States*, 505 U.S. 144, 176 (1992) ("A choice between two unconstitutionally coercive regulatory techniques is no choice at all. [I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance.") (citing *Gregory v. Ashcroft*, 501 U.S. 452,

460) (1991). Like States such as New York, which faced " 'the 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress" ', the State of New Jersey and its officials are being accorded no room to implement an alternative framework that does not conflict with PASPA. "*Id.* at 176

Understandably, preemption must be the theory of respondents' case for it to shape-shift an unconstitutional and illegal command under the Tenth Amendment into a permissible exercise of Federal authority under the Supremacy Clause. *See, e.g.*, Resp. Br. in Opp. to Pet. for Cert., *Christie v. Nat'l Collegiate Athletic Ass'n.*, Nos.16-476 & 16-477 (2016) (citing *Arizona v. United States*, 132 S. Ct. 2492, 2500-01) (quotation omitted); Br. of U.S. as *Amicus Curiae* at 12, *Christie v. Nat'l Collegiate Athletic Ass'n.*, Nos.16-476 & 16-477 (U.S. May 2017) ("Such regulations of the States' own activities do not violate the anti-commandeering principle because they "do[] not require the States in their sovereign capacity to regulate their own citizens" and "do [] not require state officials to assist in the

enforcement of federal statutes regulating private individuals.")

The Federal purpose that underlies PASPA, which is to prohibit unauthorized sports betting and its spread, relies greatly on state functions and employees (especially law enforcement and revenue officials) for its execution and enforcement. Without the States' cooperation, the Federal policy could not have been executed as widely (geographically speaking) or comprehensively as it has been.

The Court must see the 2014 Repeal Law for what it is and define it accordingly. Amicus knows that this is not an easy but a very important task in preserving our federalist system of government. Amicus would urge the Court as it considers whether a State repeal is or isn't an "authorization by law" under PASPA to balance its construction in a way that offsets, if not deters, Congressional and Executive intrusions upon State sovereignty that move us closer to "a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished

from individuals." *New York*, 505 U.S. 144, 180 (1992).

II. PASPA VIOLATES THE ANTI-COMMANDEERING DOCTRINE

a. The Anti-Commandeering Doctrine Does Not Exclude Negative Requirements

The statutory commands made to the States in both *New York* and *Printz* were affirmative requirements and directives. J.A. at 156a ("Unlike the problematic "take title" provision and the background check requirements, PASPA does not *require* or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, **to expend any funds**, or to **in any way enforce federal law**.") (Fuentes, J.) (bold emphasis added). While it is certainly easier to depict an affirmative requirement as being a command, there is no black letter rule or federal case law that categorically excludes negative

requirements from the anti-commandeering doctrine.[14]

There is no reason to think that the Framers would have seen a need for such an exclusion given the high number of federal statutes, which are drafted to include negative requirements or combinations of positive and negative requirements. And, given how few anti-commandeering challenges are prosecuted successfully, it would not be sensible to disqualify such a substantial number of legislative measures from anti-commandeering analysis or challenge.[15] Finally, an exclusionary rule like the one that respondents purport exists could tempt Congress to opt more often than not, or more than it should, to impose negative requirements on States

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[14] Coercion means to cause (a person or an object) to give in to pressure. The pressure can be applied directly to subject a specific person to that pressure, or the entity that is coercing can engage in implied or constructive coercion by applying indirect pressure. *State v. Darlington*, 153 Ind. 1, 53 N.E. 025; *Cliappell v. Trent* 00 Va. S49, 19 S.E. 314; *Radicli v. Ilutohins* 95 U.S. 213, 24 L. Ed. 409; *Peyser v. New York* 70 N.Y. 497.20 Am. Rep. G24; *State v. Boyle*, 13 R.I. 53S.

[15] *See supra* n. 8.

in legislation. Such developments would be an anathema to federalism and "prevent States from functioning as... sovereign[s]." *New York*, 505 U.S. at 177.

b. PASPA's Commands Are Unconstitutional For Compelling The States To Regulate Their Own Citizens In Their Sovereign Capacity

Congress is compelling the State of New Jersey through PASPA, as construed by the Third Circuit, to reinstate former prohibitions against sports betting that it no longer wants to maintain in effect. This same act of Congress also compels the State of New Jersey to forego the enactment of its 2014 Repeal Law—a sports wagering law that New Jersey and a majority of her citizens do in fact want to have effect in the State's legal codes.

It does not matter that PASPA is not as prescriptive as the Low Level Radiation Waste Amendments Act of 1985 or the Brady Handgun Law, or that PASPA does not contain affirmative requirements. These statutes did not

contain the same sorts of ere not maladies or infirmities contained in PASPA, whose simplicity can in some ways challenge the vision of federal courts in objectively identifying and rooting out unconstitutional commands where they exist in federal law.

Federal laws that compel States to abandon their own powers and govern instead according to Congress's instructions, regulate their own processes, or that conscript them or state officials to achieve their ends and priorities illegally commandeer the States. The anti-commandeering doctrine seeks to maintain political forms and processes in order to promote political accountability.

PASPA unlawfully commands States, such as New Jersey, which have opted to deregulate enforcement and criminalization of persons engaging in sports wagering, to sanction their citizens. *See New York*, 505 U.S. at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.") While States cannot stop the Federal Government from enforcing federal law within their territory, the

Federal Government cannot command the State to create a law criminalizing the conduct. Chemerinsky, Forman, Hopper, and Kamin, *Cooperative Federalism and Marijuana Regulation* 62 UCLA L. REV. 74 (2015) (citing *Printz*, 521 U.S. at 912; *New York*, 505 U.S. at 162.)

The statutory sources of PASPA's unconstitutional commands to the States are embodied in Sections 3702 and 3703 of the Act. At its heart, PASPA directs the States and private persons acting on a State's authority not to undertake certain activities or actions establishing "lottery, sweepstakes, or other [sports] betting, gambling, or wagering scheme[s.]" 28 U.S.C. §§3702 (2), (3). The 2014 Repeal Law which is, by far, more in keeping with what the majority of New Jersey's citizens voted for and support, does not conflict with relevant Federal laws or policy. Yet, Congress has commanded the State of New Jersey to reinstate and enforce its instructions and federal policy.

Proper form matters because it promotes federalism and in turn, individual liberties and freedoms are better protected. Where the federalist

system of government is concerned, the form and predictability of process, unlike the random chances of a wagering scheme, can promote compelling goals of national importance.[16]

Providing constituents with access to more government officials on multiple levels of government augments constituents' awareness and power among political and governmental bodies.[17] It also promotes political

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[16] The Tenth Amendment and its anti-commandeering doctrine, unlike Commerce Clause preemption, is just as obsessed over the form of a law or a measure as its function or functionality. This derives from the Framers' unconditional esteem and respect for the prominence of States as dual sovereigns in the federalist system to, among other things help diffuse the power of individuals and minorities in society, and reliably inform the electorate in promoting political accountability. *See supra* n.4. *But see* Resp. Br. in Opp. to Pet. for Cert 2016 US S. Ct. Briefs Lexis 4627, 4630 ("Far from evincing any constitutional problem, PASPA's preemption of that novel law follows from a straightforward operation of the principle that the substance of a state law, not its label or form, controls the preemption analysis.")

[17] Unconstitutional commands to the States are also corrosive of checks and balances as the interests and power of individual citizens are made less diffuse and conspicuous.

accountability by easing citizens' abilities to learn and understand what the distinctive positions of political actors and entities are, and which entities are responsible for forwarding or not supporting particular initiatives, especially those that are controversial or more widely-followed.

Political accountability goes beyond enabling citizens to know in some linear way which governmental entity or actor is responsible for having passed or implemented a particular legislative measure or policy. Through greater accountability, a State's citizens can frame whether their elected officials and representatives are doing enough to merit the privilege (through the election process) of continuing to represent and serve the citizens of that State.

The Constitutional blueprint for protecting and promoting individual freedoms and liberties depends heavily on the concept of dual sovereignty and its application to federal-state relations. Congress's commands to the New Jersey Governor and State Legislature should not be able to wipe those freedoms away, or to blur and distort further the pathways of power and decision-making

with respect to sports wagering within the States.

The command of Congress, construed by the Third Circuit as its faithful agent, ordering the State of New Jersey to reinstate former and repealed sports gambling prohibitions and to enforce those rejected laws and regulations violates New Jersey's separate and distinct sovereignty under the U.S. Constitution, as a State.

CONCLUSION

The State of New Jersey made a decision regarding what its own State laws and regulations should and should no longer include on the subject of sports gambling. It was and remains a decision with which other States and citizens are free to agree or disagree.[18]

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[18] We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. As Justice Jackson recognized some decades ago, "It is not the function of the government to keep the citizen from falling into error; it is the function of the citizen to keep the government from falling into error." *American Communications Association v. Douds*, 339 U.S. 382, 442-43 (1950).

The State of New Jersey and its citizens are being coerced by Congress, against their will, to enact legislation governing private conduct—namely, sports wagering—over which it shares power under the Commerce Clause with the Federal Government. By ordering New Jersey to maintain prohibitions on sports gambling that its State legislature has considered and repealed before, Congress is coercing the State of New Jersey to govern according to Congress's instructions.

As this form of coercion is unconstitutional pursuant to the guarantees to the States in the form of the Tenth Amendment, this Court should hold that PASPA is unconstitutional.

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RECORD AND BRIEFS

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In the Supreme Court of the United States

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GOVERNOR OF NEW JERSEY, ET AL.,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF STOP PREDATORY GAMBLING, CENTER FOR POPULAR DEMOCRACY, CHRISTIAN COALITION OF AMERICA, CONCERNED WOMEN FOR AMERICA, FAITH & FREEDOM COALITION, ISLAMIC SOCIETY OF NORTH AMERICA, NATIONAL ASSOCIATION OF EVANGELICALS, PUBLIC GOOD LAW CENTER, PUBLIC HEALTH ADVOCACY INSTITUTE, UNITED FOR A FAIR ECONOMY, ALABAMA CITIZENS ACTION PROGRAM, LOUISIANA BAPTIST CONVENTION, THE LUTHERAN CHURCH – MISSOURI SYNOD, AND SEVENTEEN STATE FAMILY POLICY COUNCILS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are a diverse and broad coalition of organizations from across the country and the political spectrum. They include some of the nation's largest and most prominent Christian and Muslim religious groups and national advocacy groups that focus on issues ranging from public health to economic justice. Although they come to the issue from varied perspectives, they file this brief together because they are united in their opposition to the exploitation of American communities through commercial gambling. Some of the *amici* have experience combatting the impact of predatory commercial gambling throughout the nation, and have seen firsthand how state legalization of gambling undermines communities and leads to the capture of state governments by gambling organizations. They have a strong interest in the continued strength of federal limitations on state-sanctioned commercialized gambling.

Amici file this brief to illustrate, with empirical evidence, the importance of Congress's efforts to prohibit state-sanctioned sports gambling. This brief counters the representations made by petitioners and their *amici*—and by the American Gaming Association in particular—that PASPA is a failure and state-sanctioned sports gambling would benefit society.[2] Permitting states to implement legal sports gambling regimes would cause significant financial, health, and social problems for many citizens. The prohibitions of the Professional and

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of amicus briefs are on file with the Clerk.

[2] *See, e.g.*, Pet. Br. At 7–8; Br. of the American Gaming Association (AGA Br.) at 10–20; Br. of Pacific Legal Foundation et al. at 17.

Amateur Sports Protection Act (PASPA)—very few of which are challenged by the petitioners in this case—do not violate the Constitution's anti-commandeering doctrine, and *amici* encourage the Court to reject the petitioners' invitation to invalidate PASPA in part or in whole.

Stop Predatory Gambling is a national government-reform network that advocates to improve the lives of the American people by stopping the practice of state-sanctioned gambling. Stop Predatory Gambling believes that no government agency should actively encourage citizens to gamble nor depend on gambling to fund its activities. It coordinates campaigns across the country to persuade officials to contain the effects of gambling.

The Center for Popular Democracy works to create equity, opportunity, and a dynamic democracy in partnership with high-impact base-building organizations, organizing alliances, and progressive unions. CPD strengthens our collective capacity to envision and win an innovative pro-worker, pro-immigrant, racial and economic justice agenda. Legalized predatory gambling is contrary to CPD's mission and values, as it undermines vulnerable communities and entrenches exploitation in state and local government.

The Christian Coalition of America is a tax-exempt organization and one of the largest grassroots political groups in the country with over 2 million members. The organization is involved in educating public officials and members of the community on important, pro-family issues of national concern. The Christian Coalition has played a particularly active role to promote state and federal efforts to combat the harms of gambling.

Concerned Women for America is the largest Christian public policy women's organization in the

United States, with half-a-million participants and supporters from all 50 states. Through its grassroots organization, CWA protects and promotes Biblical values and constitutional principles through prayer, education, and advocacy. CWA is made up of people whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful or the elite. CWA is profoundly committed to the protection of the family as the bedrock institution of society.

The Faith & Freedom Coalition is a pro-family organization with over 1.5 million members and supporters nationwide. It believes that the greatness of America lies not in government but in the character of its people—the simple virtues of faith, hard work, marriage, family, personal responsibility, and helping the least among us. The Coalition is committed to educating, equipping, and mobilizing people of faith and like-minded individuals to be effective citizens. The Coalition aims to influence public policy and enact legislation that strengthens families, promotes time-honored values, protects the dignity of life and marriage, lowers the tax burden on small business and families, and requires government to tighten its belt and live within its means.

The Islamic Society of North America and its Office for Interfaith and Community Alliances seek a more equitable, just, and faith-filled America and work with interfaith allies to push for prosperity for all. State-sponsored predatory gambling destroys families by prying on the economically downtrodden, capitalizing on gimmicks and deceit, and generating addiction. ISNA has stood publicly against state-sponsored predatory gambling for nearly a decade, and is concerned that a ruling for petitioners would be a dangerous precedent for our country.

The National Association of Evangelicals is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, their religious ministries, and separately-organized evangelical ministries. It strongly believes that gambling is socially, morally and economically destructive to individuals, families and communities. NAE members see gambling as a social evil that feeds upon greed and sells a set of fantasy values. It especially harms the poor, who can least afford to forfeit their financial resources on the promise of instant wealth.

The Public Good Law Center is a public interest organization dedicated to the idea that the law exists to serve everyone, not just those with means and ready access to the courts. Public Good seeks to influence the development of the law in order to protect the rights of ordinary people. State-sanctioned gambling has proved a quiet scourge in states across the nation, with the most economically vulnerable communities hit the hardest. To expand predatory gambling at a time when levels of household debt are again on the rise would worsen an already critical situation.

Public Health Advocacy Institute is a nonprofit organization incorporated in Massachusetts in 1979 and based at Northeastern University School of Law in Boston, Massachusetts. PHAI is a legal research and advocacy center focused primarily on public health issues, including state-sponsored gambling. It is committed to research in public health law, public health policy development; legal technical assistance; and collabora-

tive work at the intersection of law and public health including litigation. This case is of great concern to PHAI because widespread state-sponsored sports gambling poses a substantial risk of devastating public health consequences associated with addiction, crime, and poverty.

United for a Fair Economy challenges economic inequality in the United States. UFE uses popular economics education, trainings, creative communications and coalition building to support social movements working for a resilient, sustainable, and equitable economy. UFE believes that a fair economy is built around: jobs with dignity and living wages, where workers have the democratic right to organize and share the wealth produced by their labor; a robust public sector that works for the common good, funded through progressive taxes and accountable to the people; equal opportunity and equal justice for people who have been marginalized in society based on gender, sexual orientation, race, nationality, and social class; and sustainability and equity, where individuals do not accumulate excesses of wealth to the detriment of others and the planet.

The Alabama Citizens Action Program is an interdenominational organization representing most Southern Baptist, Free Will Baptist and Nazarene churches in Alabama, and many Presbyterian Churches of America (PCA), Methodist, Assemblies of God, Churches of God and other smaller denominations and independent churches within the state of Alabama. Southern Baptist churches in Alabama total over 3,100 and represent 1.1 million people (almost one fourth of the entire population of the state). ALCAP has lobbied the Alabama Legislature for over 40 years, opposing the expansion of state-sanctioned gambling in Alabama.

The Louisiana Baptist Convention is a fellowship of 1,650 churches and 500,000 baptized members who cooperate in bringing persons to God throughout the world. The Convention maintains an Office of Public Policy to represent Louisiana Baptists in public policy matters pertaining to moral and social concerns, including state-sponsored gambling—a practice that Louisiana Baptists oppose.

The Lutheran Church—Missouri Synod has some 6,100 member congregations with 2,100,000 baptized members throughout the United States. The Synod has 35 districts, two auxiliaries, two seminaries, 10 universities, numerous related Synod-wide corporate entities, hundreds of recognized service organizations, and the largest Protestant parochial school system in America. The Synod steadfastly adheres to orthodox Lutheran theology and practice and has serious moral concerns with the proliferation of gambling and its harmful consequences. It therefore fully supports federal law limiting state-sanctioned gambling.

The **seventeen state family policy councils** listed below work within their respective states to promote policies that foster stable families, responsible parenting, and individual virtue. They are nonprofits that recognize the broad deleterious economic and social effects of gambling on society, especially as it relates to the communities, families, and lives of individuals who are victimized by problem and pathological gambling. They are concerned that the loss of PASPA protections would lead to a significant increase in legalized sports gambling in the United States and would result in immeasurable harm to communities, families and citizens across our nation.

Alaska Family Action

Christian Civic League of Maine
Colorado Family Action
Cornerstone Action (New Hampshire)
Family Policy Alliance of Idaho
Family Policy Alliance of North Dakota
Family Policy Council of West Virginia
Family Policy Institute of Washington
Hawaii Family Forum
Louisiana Family Forum
Minnesota Family Council
Nebraska Family Alliance
New Yorker's Family Research Foundation
North Carolina Family Policy Council
Palmetto Family Council
The Family Foundation (KY)
Wisconsin Family Council

INTRODUCTION AND SUMMARY OF ARGUMENT

State regulation of gambling is unlike the regulation of other industries. Driven by revenue goals, state "regulation" often becomes state promotion of gambling. State agencies end up running lotteries, operating casinos, partnering with private gambling corporations, and expending millions of dollars to advertise gambling to their own citizens. Unlike informal social gambling (such as an office pool or a poker game between friends), this state-sanctioned gambling involves large commercial enterprises that seek profit by preying on the vulnerable: youth, low-income households, and gamblers who become addicted.

In the wake of a massive wave of gambling legalization and sponsorship by state governments, Congress passed the Professional and Amateur Sports Protection Act (PASPA) to tackle the specific ill of state-sanctioned sports gambling. Congress was not merely concerned with sports gambling in isolation. Instead, Congress sought to combat the normalization of sports gambling that comes with government promotion. In so doing, Congress responded to a particular set of forces that necessitate federal intervention in states' involvement with gambling. States have had trouble resisting the pull of legalized gambling once their neighbors have legalized it; they have had trouble getting rid of legalized gambling once they have it; and they have had trouble controlling it in a way that benefits and protects the public, including citizens in other states. Despite claims that legalizing gambling is good for tax revenue, studies that examine the net effect of state-sanctioned gambling find that when states legalize casinos they lose money just like the patrons inside.

Congress enacted PASPA because it saw sports gambling as a national problem and believed state-sanctioned sports gambling would only make matters worse. Sports gambling threatens to promote gambling among the nation's youth and undermines the public's confidence in and enjoyment of sports. These harms are worsened when state governments put their imprimatur on gambling and promote it to the populace. PASPA thus not only mitigates the problems of sports gambling generally but also forestalls the distinct aspects of those problems that arise when states sponsor, operate, and promote sports gambling schemes.

This federal statute, as important now as when it was passed, is constitutionally valid and should remain in effect. PASPA's prohibition on state "authoriz[ation]" of sports gambling does not run afoul of this Court's anti-commandeering doctrine. The animating concern of the doctrine is that the federal government should not be able to "commandeer" state resources for the implementation of federal policy. But PASPA contains no provision requiring affirmative action by state governments: It does not require the states to do anything at all.

In any event, regardless of what the Court concludes with respect to PASPA's "authorize" and "license" terms, it should decline the petitioners' invitation to strike down PASPA in its entirety. Petitioners are wrong to speculate that, absent the challenged terms, Congress would have wanted robust state regulation of sports gambling. To the contrary, as discussed above, Congress sought specifically to limit state endorsement of state gambling in addition to restricting the practice of sports gambling *per se*. The Court should therefore decline the petitioners' invitation to invalidate all of PASPA's restrictions.

ARGUMENT

I. PASPA addresses the national problem of state-sanctioned sports gambling by recognizing the unique harms that come from leaving state governments to address gambling alone.

This Court has long recognized that when the "mischiefs" of gambling are carried out through "the agency of interstate commerce," Congress is empowered to protect the public through "effective regulation." *Champion v. Ames*, 188 U.S. 321, 357–58 (1903). In the early 1990s, Congress confronted a wave of state gambling legislation that transformed our nation from one in which legal gambling was a rarity to one in which it was suddenly commonplace. Observing the rapidity of this trend, federal legislators noted that state governments were unable to contain the harms of gambling, and determined that national legislation was needed. Concerned in particular with state sponsorship of sports gambling and the effect it would have on the nation's youth, Congress passed PASPA in 1992.

As explained in the respondents' brief, PASPA does not violate the anti-commandeering doctrine. Under that doctrine, "Congress cannot compel the States to enact or enforce a federal regulatory program," nor can it "circumvent that prohibition by conscripting the State's officers directly." *Printz v. United States*, 521 U.S. 898, 935 (1997). PASPA does no such thing. It contains no provision requiring a state to adopt a set of laws, regulations, or practices. *Cf. New York v. United States*, 505 U.S. 144, 153–54 (1992). Nor does it require state officers to perform any actions whatsoever. *Cf. Printz*, 521 U.S. at 903. No state is required to "expend any funds, or participate in any federal program." *New York*, 505 U.S.

at 174. PASPA, in short, does not require any state to undertake any action at all.

The fact that New Jersey may not adopt its preferred set of laws and regulations—including the detailed regulatory scheme it stylizes as a "repeal" in this case—does not mean that its regulatory process has been "commandeered" any more than in a typical federal preemption case. *Cf.* 49 U.S.C. § 41713(b)(1) (providing that "a State . . . may not enact or enforce a law, regulation, or other provision . . . related to a price, route, or service of an air carrier"); *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014) (discussing preemption under 49 U.S.C. § 41713(b)(1)). Nor may New Jersey extract an anti-commandeering violation from the district court's unremarkable injunction against the enforcement of the state law. *See* Pet. Br. at 36–37. Construing a federal court injunction to stop enforcement of a preempted state law as impermissible "commandeering" would be a vast expansion of *New York* and *Printz* with extensive and troubling implications for many federal laws.

Rather than requiring action by the states, PASPA acts as a prohibition on both states and private individuals. PASPA prohibits the creation and operation of legal sports gambling regimes like those under which lotteries and casinos have spread throughout the country. Our nation's experience with these forms of state-sponsored gambling, as well as the experience of other countries that have legalized sports gambling, proves that PASPA's protections continue to be necessary. State-sanctioned gambling regimes target and exploit the financially desperate, exacerbate crime, cultivate addiction, and force even those citizens who rarely or never gamble to foot the bill for the enormous social costs and state budget problems they leave behind.

A. Interstate competition incentivizes states to legalize gambling in a nationwide race to the bottom, requiring federal intervention.

PASPA was passed in the midst of a rapid, uncontrolled spread in state-sponsored gambling. In 1988, only Nevada and New Jersey permitted casino gambling within their borders. By 1996, 27 states had legalized casino gambling, and around 500 casinos were in operation.[3] Concerned with this dramatic shift, Congress created a national commission to study the impact of gambling. In 1999, the commission reported that "the United States has been transformed," and called for a moratorium on the expansion of gambling. National Gambling Impact Study Commission, *Final Report*, 1-1, 1-7 (1999) (National Gambling Impact Study).

There was no moratorium.[4] By 2003, one study concluded, Americans were spending a record $73 billion on state-sanctioned gambling—mostly on casino gambling and state lotteries.[5] In 2016, Americans lost an estimated $117 billion on state-sanctioned gambling.[6] Americans now spend more just on state lotteries than they do on sports tickets, music, video games, and books combined.[7]

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[3] John Donahue, *The Devil in Devolution*, The American Prospect (May 1997), https://goo.gl/dN6ptZ.

[4] Laurence Arnold, *Two years after federal report, gambling continues to spread*, Las Vegas Sun (Aug. 16, 2001), https://goo.gl/GWmh5h.

[5] Melissa S. Kearney, *The Economic Winners and Losers of Legalized Gambling*, National Bureau of Economic Research (2005), https://goo.gl/yGwDsi.

[6] *The World's Biggest Gamblers*, The Economist (Feb. 9, 2017), https://goo.gl/Aibyu2.

[7] Jonathan D. Cohen, *The U.S. has a lottery problem. But it's not the people buying tickets*, The Washington Post (Sept. 13, 2017),

State-sanctioned gambling spread so rapidly because interstate competition leaves state and local governments with a Hobson's choice. State-sanctioned gambling brings with it massive costs, which often fall on the public fisc. *See infra* Section I. B. But states cannot effectively limit their own citizens' access to gambling in other states. A 2003 study by the Kentucky State Legislature, for instance, found that 460,000 Kentucky residents—over 15% of the state—had left Kentucky to gamble on other states' riverboat casinos at least once in the past year. *Compulsive Gambling in Kentucky*, Kentucky Legislative Research Commission, 30 (2003). And a 2006 study of Boston residents found that 26%—over one million individuals—had gambled at casinos during the prior year, despite a complete absence of legal casinos in Massachusetts.[8] When casinos locate themselves near borders to lure citizens in nearby states, there is little the neighboring state government can do.

This means that when states legalize a form of gambling, their neighbors have to decide whether to swallow the social costs as their citizens travel next door to gamble or to legalize the same form of gambling themselves and at least recoup some tax dollars. Unsurprisingly, nearly all choose to legalize gambling. The National Gambling Impact Study dubbed this phenomenon a "competitive ripple effect," in which states were "driven more by pressures of the day than by an abstract debate

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https://goo.gl/oagDJe; John Oliver, *The Lottery: Last Week Tonight with John Oliver*, at 1:40, YouTube (Nov. 9, 2014), https://goo.gl/6v3WWX.

[8] *Comprehensive Analysis: Projecting and Preparing for Potential Impact of Expanded Gaming on Commonwealth of Massachusetts*, Spectrum Gaming Group (Aug. 1, 2008), at 50–51, https://goo.gl/jVbiR4.

about the public welfare."[9] As the Governor of Kansas said of the decision to create a state lottery, "[n]ot having one when your neighbor has one is like tying one hand behind your back."[10] And interstate gambling companies have taken the message to the people: legalize gambling, or watch the money pour out of your state. This sales pitch is frequently repeated in industry-funded ads to promote ballot initiatives across the country.[11]

The inability of state governments to stop the spread of gambling has justified federal intervention for over a century. *See, e.g., In re Rapier*, 143 U.S. 110 (1892); *Champion v. Ames*, 188 U.S. 321 (1903); *Federal Regulation of Gambling*, 60 Yale L.J. 1396 (1951) (collecting federal statutes regulating gambling in force in 1951). PASPA was passed specifically to prevent this interstate dynamic from developing in the context of sports gambling, which the Senate concluded was "a national problem." S. Rep. No. 102-248, at 5-6 (1991). The Senate Judiciary Committee Report on PASPA found that "[t]he harms [sports gambling] inflicts are felt beyond the borders of those States that sanction it," and the "moral erosion it produces cannot be limited geographically." *Id.* Citing the pressure all states would begin to feel once any began to legalize sports gambling, the report argued that "[w]ithout Federal legislation, sports gambling is likely to spread on a piecemeal basis and ultimately develop an irreversible momentum." *Id.*

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[9] National Gambling Impact Report at 1-5

[10] Michael Nelson, *Casinos Royale*, The Weekly Standard (June 27, 2016), https://goo.gl/tQ5hUi.

[11] *See, e.g.*, Massachusetts, 2014 https://goo.gl/eJG3GL; Ohio, 2009 https://goo.gl/vr2HeL; Maryland, 2008 https://goo.gl/BneMwz; Maine, 2008 https://goo.gl/Ta6uG5.

History has proved that Congress was right to be concerned. As *amici* show below, the past several decades of state gambling laws have resulted in the widespread rise of state-sponsored predatory gambling. Seeking to out-compete other states and live up to outlandish promises of increased tax revenue, state governments have lavished legal and promotional privileges on powerful gambling interests, which often enjoy outright monopolies and wide latitude to aggressively lure citizens to lose their money. The resulting damage to citizens, families, and communities throughout the country has been enormous.

B. State-sponsored predatory gambling has wreaked enormous damage on individuals and communities in recent years, with the worst effects concentrated on the most vulnerable.

As the congressionally sponsored National Gambling Impact Study Commission noted, gambling is not just "a business like any other."[12] "Unlike other businesses in which the market is the principal determinant," the Commission observed, "the shape and operation of legalized gambling has been largely a product of government decisions."[13] Far from responsible oversight, however, the experience of legalized gambling in the United States has been one of collaboration between local and state governments and powerful corporate gambling interests. State governments have become "enthusiastic purveyors" of gambling, and have shared in the aggressive marketing and profiteering of gambling enterprises.[14] The result has been the development of

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[12] National Gambling Impact Report at 1-4.

[13] *Id.*

[14] *Id.*

predatory state policies and widespread financial, health, and social problems for individuals and families.

In recent decades, the harms of state-sanctioned gambling have been most apparent in communities' experience with lotteries and casinos. Research has consistently shown "a steady association between poverty and lottery play." Arthur C. Brooks, *Powerbull: The Lottery Loves Poverty*, Wall Street Journal (Aug. 27, 2017), https://goo.gl/1diT6j. The poorest Americans buy more than half of all lotto tickets. *Id.* While lottery advocates may refer to games of chance as mere "entertainment," a different message is intentionally sent to lower-income Americans. As state lotteries became prominent in recent decades, "state agencies and private companies presented lotteries as reliable means of monetary gain" to appeal to a generation of consumers and workers experiencing less upward mobility.[15] State agencies, exempt from truth-in-advertising laws and aiming to maximize revenue, run deceptive ads—with some even indicating that winning the lottery is a probable outcome.[16] Some ads specifically target poor areas, as when the Illinois Lottery placed a billboard in a poor Chicago neighborhood that read "[t]his could be your ticket out."[17]

State governments use these tactics because they're effective. One survey in 2010 found that, when asked what the most likely way for them to get rich would be, Americans said "winning the lottery" at similar rates to

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[15] Jonathan D. Cohen, *State Lotteries and the New American Dream*, Center for Gaming Research, University of Nevada, Las Vegas, at 2 (2016), https://goo.gl/GBtMex.

[16] *See* National Gambling Impact Study at 3-15–3-16; 18 U.S.C. § 1307.

[17] Cohen, *State Lotteries* at 5.

starting their own business or finding a high-paying job.[18] And when a new state lottery is introduced, lower-income households fund their ticket purchases by reducing their spending on food and mortgage payments rather than on entertainment or other gambling.[19] Studies confirm that this spending choice is made not because low-income consumers view lotteries as a cheaper form of entertainment but because they turn to lotteries in an attempt to improve their standard of living. Garrick Blalock et al., *Hitting the Jackpot or Hitting the Skids: Entertainment, Poverty, and the Demand for State Lotteries*, 66 American Journal of Economics & Sociology 545 (2007). For many Americans, state lotteries have become a Hail Mary investment strategy—one that is nearly guaranteed to fail.

The net effect is evident in states like Maine, where residents with low enough incomes to be on public assistance spent hundreds of millions of dollars on the lottery between 2010 and 2014, but collectively recouped only $22 million in winnings.[20] At the end of the day, lotteries function as highly regressive taxes that redistribute money away from lower-income families.[21]

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[18] *Id.* at 3.

[19] Melissa S. Kearney, *State Lotteries and Consumer Behavior*, National Bureau of Economic Research, at 3 (2002), https://goo.gl/n69h7W.

[20] Dave Sherwood, *People on public assistance spent hundreds of millions on the lottery – and took home $22 million in winnings*, Pine Tree Watch (Dec. 16, 2015), https://goo.gl/RwDATP.

[21] See, e.g., Ginny Blankenship, *Gambling on Our Future: Why a State-Sponsored Lottery is Still a Bad Bet for Education & Families in Arkansas*, Arkansas Advocates for Children & Families (2008), https://goo.gl/oZmMeq.

State lotteries are not the only form of gambling that, when legalized, becomes both predatory and inextricably tied to government revenue. Casinos (one of the categories of places where New Jersey seeks to permit sports gambling) are built on a model of exploiting addiction. While gambling advocates tout "responsible gaming" guidelines,[22] the casino industry's profits are built around a small minority of players. Customers who follow responsible gambling guidelines account for 75% of players but contribute only 4% of gambling profits. Natasha Dow Schüll, *Addiction by Design: Machine Gambling in Las Vegas* 267 (2012). As the author of one gambling study put it, "[i]f responsible gambling were successful then the industry would probably shut down for lack of income." *Id.*

Instead, casinos draw their profits from a narrow subset of vulnerable gamblers, often referred to as "problem gamblers," or in more severe cases "gambling addicts."[23] Gambling addiction has been recognized by the American Psychiatric Association since 1980 and is included in the Diagnostic and Statistical Manual of Mental Disorders; those who suffer from gambling addiction experience a behavioral compulsion to gamble similar to the chemical addiction experienced by drug users.[24] Gambling addicts develop highs and experience

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[22] *Casino industry in US has new rules for responsible gambling*, CNBC (Aug. 4, 2017), https://goo.gl/q2HM5C.

[23] David Blankenhorn, *New York's Promise: Why Sponsoring Casinos is a Regressive Policy Unworthy of a Great State*, Institute for American Values, at 68 (2013) (summarizing the distinctions as "Problem: My gambling causes problems in my life. Pathological: I am a gambling addict, or what is sometimes called a compulsive gambler."); *see also* Schüll, *Addiction by Design* at 14–18 (describing gambling addiction).

[24] Schüll, *Addiction by Design* at 14–18.

withdrawal symptoms, and their neurological control systems are less effective at regulating their behavior.[25] The University of Buffalo's Research Institute on Addictions estimates that between three and five percent of Americans have a gambling problem.[26]

The financial and social costs of gambling disorders are staggering. By one estimate, between 20% and 30% of pathological gamblers declare personal bankruptcy—compared to 4.2% of the general population—with an average cost to creditors of these bankruptcies is $39,000.[27] Nearly one-third of pathological gamblers report gambling debts between $75,000 and $150,000. To pay these debts, one out of five turn to loan sharks.[28] Predatory gambling thus fuels predatory lending. The majority of pathological gamblers report missing work to gamble; about one third lose their jobs due to their disorder.[29] Divorce rates among pathological gamblers are more than twice as high as among non-gamblers, and 90% of pathological gamblers report gambling with their paychecks or family savings.[30] The estimated annual cost of gambling addiction in the U.S. has been estimated to be between $5 billion and $7 billion.[31]

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[25] John Rosengren, *How Casinos Enable Gambling Addicts*, The Atlantic (Dec. 2016), https://goo.gl/TStEBn.

[26] *Gambling*, Research Institute on Addictions (April 24, 2012), https://goo.gl/mo1Kg8.

[27] *Social Costs of Problem Gambling*, Problem Gambling Research and Intervention Project, Georgia State University, https://goo.gl/kcgQv2.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*; *see also Problem Gamblers and their Financies*, National Council on Problem Gambling, at 6 (2000),

Casinos look at these afflicted citizens with dollar signs in their eyes. As the "Director of Responsible Gambling" at one major international gambling firm put it, "[o]ur game designers . . . [are] creative folks who want machines to create the most revenue." Schüll, *Addiction by Design* at 21. Casinos use cameras, computers, and loyalty cards to track their most frequent customers, analyze their habits, and manipulate them in myriad ways to continue wagering. Rosengren, *How Casinos Enable Gambling Addicts*. They provide specialized ATMs and cash advances to gamblers, and aggressively target the gamblers with the highest "predicted lifetime value" to the casino. *Id.* The result is that casinos' business plans are based heavily on those with gambling addictions. *Id.*

Once these forms of commercial gambling are legalized, experience shows it is nearly impossible for states to rid themselves of them or effectively regulate them. State-sanctioned gambling creates influential vested interests that obstruct policy change, sometimes coming from within the government itself. States take financial interests in specific pieces of property or go so far as to own and operate casinos themselves. *Id.* As a result, it also becomes harder for states to effectively regulate the gambling industry in the name of the public interest.[32] When gambling revenues are earmarked for specific programs like education, states frequently decrease other appropriations for those programs.[33] As a result,

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http://www.ncpgambling.org/files/public/problem_gamblers_finances.pdf; National Council on Problem Gambling Statement to the New York State Gaming Commission, Forum on Problem Gambling, April 9 2014, https://goo.gl/VtrNo9.

[32] *See*, e.g., Blankenhorn, *New York's Promise* at 23.

[33] *See* Mimi Kirk, *For Schools, Gambling Funding is No Jack-*

specific public services become dependent on gambling revenue, creating broader constituencies to mobilize against new restrictions.[34]

Our nation's experience with legalized lotteries and casinos demonstrates that state-sanctioned gambling is a Pandora's box. Government agencies and private companies quickly become predatory and exploitative, with substantial social costs. These costs are borne primarily by lower-income households and those who develop gambling addictions. And once the lid on gambling is lifted, it is very hard to put back.

C. Permitting states to authorize and promote sports gambling would open new avenues for exploitation and crime, threaten the well-being of children and youth, and impose substantial net costs on communities.

Invalidating PASPA would cause these problems to proliferate. The petitioners and their *amici* argue as if the amount of gambling in society is a given, and the public only has to choose whether to regulate and tax it or consign it to the shadows. *See, e.g.*, AGA Br. at 16–20. But our nation's experience shows just the opposite. When new forms of gambling are permitted, gambling participation rates go up, as do the financial, health, and social problems that go with them.[35] Legalizing gambling increases the rate of problem gambling in communities anywhere from two to seven times its pre-legalization

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pot, CityLab (Feb 21, 2017), https://goo.gl/hkiqVa.

[34] *Id.*

[35] Earl Grinols & David Mustard, *Casinos, Crime, and Community Costs*, 88 Review of Economics and Statistics 28, 32 (Feb. 2006).

rates.[36] When gambling is restricted, in contrast, many fewer people gamble.[37]

There is strong reason to think that state-sanctioned sports gambling in particular will cause the already high incidence of problem gambling to rise. Sports gambling is more tightly linked to problem gambling than other forms of wagering. In a large, recent study of 10,000 adults, researchers at the University of Massachusetts found that adults who bet on sports have higher rates of problem gambling than those who bet at casinos, bought lottery or raffle tickets, or make private bets.[38] And, in Australia, where sports gambling is legal and widespread, researchers have found greater incidences of problem gambling among those more exposed to sports-gambling promotions.[39]

Australia's experience with sports gambling also highlights that Congress was right to be concerned that legalizing sports gambling would have a particular influence on children. Congress passed PASPA because it was "especially concerned about the potential effect of legalized sports gambling on America's youth." S. Rep. No. 102-248, at 5. Promoting the bill in the Seton Hall

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[36] John Warren Kindt, *The Economic Impacts of Legalized Gambling Activities*, 43 Drake L. Rev. 51, 64 (1994).

[37] Grinols & Mustard, *Casinos, Crime, and Community Costs* at 32.

[38] Rachel A. Volberg et al., *Gambling and Problem Gambling in Massachusetts: Results of a Baseline Population Survey*, University of Massachusetts School of Public Health and Health Sciences, 52 (May 28, 2015), https://goo.gl/g8EJey.

[39] Nerilee Hing et al., *Sports-embedded gambling promotions: A study of exposure, sports betting intention and problem gambling amongst adults*, 13 International Journal of Mental Health and Addiction 115 (2015).

Journal of Sport Law, PASPA champion and former NBA star Senator Bill Bradley argued that "[l]egalized sports betting would teach young people how to gamble."[40] Senator Bradley described a compulsive gambling hotline that received half of its calls from teenagers and college-aged students, and noted that "one million of the eight million compulsive gamblers in this country are teenagers."[41]

In Australia, studies show that children are regularly exposed to messages and advertisements about sports gambling and that their views of gambling are "highly influenced" by that exposure. *See, e.g.*, Hannah Pitt et al., *"It's just everywhere!" Children and parents discuss the marketing of sports wagering in Australia*, 40 Australian and New Zealand Journal of Public Health 480, 485 (Oct. 2016). Though advertisers disclaim an intention to target youth, sports gambling "is particularly appealing to young adults," who participate at high rates.[42] Australian children say that they feel like people are "missing out" if they don't gamble as part of enjoying sports because "everyone does it." Pitt et al., *"It's just everywhere!"* at 483–84.

Reports from Australia and the U.K., where sports gambling is also legal, highlight another way in which state-sanctioned sports gambling worsens existing problems with gambling addiction. Sports gambling in

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[40] Senator Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 Seton Hall J. Sport L. 5, 7 (1992).

[41] *Id.* at 7 & n.7.

[42] Pitt et al., *Initiation, Influence, and impact: adolescents and parents discuss the marketing of gambling products during Australian sporting matches*, 16 BMC Public Health 967 (2016), https://goo.gl/RQmkn2.

those two nations has created a new market for aggressive and exploitative lending organizations: cash-strapped gamblers attempting to finance their debts or their gambling addiction. One survey in the U.K. found that 37% of respondents would be willing to take out a loan to finance a sports bet if they didn't have the money themselves.[43] And both countries have seen claims that predatory lenders like payday loan organizations have targeted those with gambling addictions, including sports gamblers.[44] The citizens of Australia now experience the biggest gambling losses in the world at nearly $1,000 per year per resident adult, more than twice as much as the United States.[45]

Petitioners' *amici* also repeat another common argument among gambling advocates: that state-sanctioned sports gambling will be a boon because it will generate tax revenues that can be spent on social services, law enforcement, and other public needs.[46] Experience has shown repeatedly that this argument is either overstated or wrong. *See* Lucy Dadayan, *State Revenues from Gambling: Short-Term Relief, Long-Term Disappointment*, The Nelson A. Rockefeller Institute of Government (2016). While states that create new revenue streams from gambling may see momentary bumps in tax income, "the revenue returns deteriorate—and often quickly." *Id.* at 1. Revenue stagnates or declines

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[43] Sarah Coles, *Punters take payday loans to bet on the Grand National*, Aol (April 4, 2017), https://goo.gl/neEzNg.

[44] *Gambling footballers take out payday loans*, BBC (Oct. 24, 2013), https://goo.gl/uPjPLE; Christopher Knaus, *Former staff say Cash Train loaned to problem gamblers, but payday lender denies claim*, The Guardian (March 15, 2017), https://goo.gl/ZuuAVR.

[45] *The World's Biggest Gamblers*, The Economist.

[46] *See, e.g.*, AGA Br. at 21.

because other states compete for gambling money and the new revenue streams begin taking money from existing revenue-generating activity. *Id.* at 14. In 2015, for instance, tax revenue from casinos declined in every state without new casinos, with a 26.9% decline since 2008 in the states with the oldest casinos. *Id.*

Revenue numbers also fail to address the reality that the harms associated with state-sanctioned gambling far outweigh the gains to revenue. Historically, at least for casino gambling, the answer has been "no." According to one comprehensive cost-benefit analysis, the costs of casino gambling—costs from increased rates of crime and problem gambling—have amounted to $3 for every $1 of gambling revenue.[47]

History suggests that the legalization of new forms of gambling worsens crime rates. After the National Gambling Impact Study Commission called for a moratorium on gambling to study its policy effects, researchers compiled a comprehensive study of all 3,165 U.S. counties over a 20-year period.[48] They found that the opening of casinos in an area increased both violent crime and property crime, and that this crime was newly induced by casinos "rather than simply being shifted from one area to another."[49] They also found that this effect increased over time for most types of crime.[50] And the Australian experience also belies *amicus* American Gaming Association's assertion (at 17) that there is "no

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[47] Rosengren, *How Casinos Enable Gambling Addicts* (citing Earl Grinols, *Gambling in America: Costs and Benefits* 2004).

[48] *See* Grinols & Mustard, *Casinos, Crime, and Community Costs.*

[49] *Id.* at 43–44.

[50] *Id.*

demand for a black market." Australia sees sums of one or two billion dollars wagered on domestic sports via unregulated, offshore entities that evade its enforcement mechanisms.[51]

Casinos increase crime rates in several ways. Desperate gamblers and those with gambling disorders commit crimes to finance their continued gambling.[52] Casinos also create opportunities for crime by increasing concentrations of cash.[53] And casinos allow organized crime to flourish by facilitating money laundering for drug cartels and other criminal enterprises.[54]

State-sanctioned sports gambling in particular threatens to create widespread opportunities for crime. Legal sports betting in other countries has facilitated money laundering and match-fixing, both of which have metastasized as sports become more international and commercialized.[55] The sports sector is particularly vulnerable to this kind of corruption for a variety of reasons. Among other things: large sums of money are transacted regularly and opaquely, and the image-consciousness of players, coaches, and sponsors means that crimes, when discovered, are less likely to be reported.[56] The optimistic prediction that state-sanctioned

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[51] Michael Carayannis, *Offshore gambling firms take billions and Australian authorities cannot act*, The Herald Sun (June 12, 2016), https://goo.gl/cVH2zy.

[52] *Id.* at 31–32.

[53] *Id.*

[54] *See, e.g.*, John L. Smith, *Reluctant casinos get clear warning*, Las Vegas Review-Journal (Sep. 29, 2013), https://goo.gl/wQo9Da.

[55] *Money Laundering through the Football Sector*, Financial Action Task Force, 24–25 (2009), https://goo.gl/7QU9ro.

[56] *Id.* at 14–16.

sports gambling will reduce corruption by increasing transparency, *see* AGA Br. at 20, is hard to square with these existing problems and the vast new opportunities for graft and corruption that would be created by state-sanctioned sports betting in the United States.

Beyond its potential to increase crime, state-sanctioned sports betting also comes at a cost to players and fans. As Senator Bradley wrote when he urged the passage of PASPA, sports play an important cultural role. Many look up to athletes as role models, and we associate sports with "the values of character, cooperation, and good sportsmanship that have figured so heavily in the growth of athletic competition throughout the ages."[57]

State-sanctioned sports betting threatens these values in at least two ways. First, sports betting "would convey the message that sports is about gambling, instead of personal achievement, sportsmanship and respect for the winner. . . . Legalizing sports gambling would encourage young people to participate in sports to win money."[58] Second, sports betting threatens public confidence in the integrity of team sports. As former NFL Commissioner Paul Tagliabue testified to Congress, "[s]ports gambling inevitably fosters a climate of suspicion about controversial plays and intensifies cynicism with respect to player performances, coaching decisions, officiating calls and game results. Cynical or disappointed fans would come to assume 'the fix was in' whenever the team they bet on failed to beat the point spread."[59]

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[57] Senator Bradley, Policy Concerns Behind PASPA at 6.

[58] *Id.* at 7.

[59] *Id.* at 8 n.10

New Jersey's law manifests these concerns, but transparently tries to foist the costs of sports gambling on other states. New Jersey specifically wrote its law to maintain its ban on gambling for college sports that take place in New Jersey and for sporting events in which a New Jersey team participates "regardless of where the event takes place." N.J. Stat. Ann. § 5:12A-7. This self-serving exemption is a tacit recognition both that sports gambling has deleterious effects and that those effects extend even when people in one state gamble on matches in other states. This sort of self-dealing, without regard to the costs imposed on other states, demonstrates that PASPA is just as necessary now as the day it was passed.

II. Regardless of whether this Court accepts petitioners' anti-commandeering arguments, it should leave PASPA largely intact.

As argued above, PASPA is constitutionally sound because it does not require action by state governments or their officers. Even if the Court holds to the contrary, however, it should refrain from invalidating any provisions of PASPA beyond the "authorize" and "license" clauses of Section 3702(1).

The petitioners argue that if the Court strikes down PASPA's prohibition on state "authoriz[ation]" of sports wagering, it should strike down the rest of the statute as well. Petitioners assert (at 53) that PASPA "cannot function" without the "authorize" term in a manner consistent with the intent of Congress. Congress, petitioners hypothesize, would not have wanted to allow states to repeal their bans on sports gambling without giving them the ability to adopt comprehensive legal regimes to manage sports gambling. This argument is wrong for three reasons.

1. Contrary to what petitioners say (at 55), there would not be an "absence of regulation" if the Court were to strike down PASPA's "authorize" term. To take this case as an example, petitioners do not claim that New Jersey's regulation is incompatible with the other terms in PASPA, and it does not appear on its face to run afoul of PASPA's prohibitions on, for instance, operating, sponsoring, advertising, or promoting sports gambling. Yet New Jersey's law transparently regulates sports gambling by limiting it only to certain venues, persons, sporting events, and so on. *See* N.J. Stat. Ann. § 5:12-1–62. Presumably, then, New Jersey and other states will be able to engage in at least some regulation of sports gambling if the "authorize" term is ruled unenforceable but the rest of PASPA stands.

Additionally, there is a wide array of federal anti-gambling legislation that remains in effect regardless of the outcome of this case. *See, e.g.*, 18 U.S.C. § 224; 18 U.S.C. § 1084; 18 U.S.C. § 1955; 31 U.S.C. § 5363.

And perhaps most obviously, the remaining terms of Section 3702(1) and all of the terms of Section 3702(2) provide a great deal of regulation regarding sports gambling in particular.[60] Suggesting that these sections of PASPA should be invalidated because Congress would have wanted *more* sports gambling regulation is nonsensical.

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[60] Petitioners argue (at 55–56) that Section 3702(2) is not severable from the "authorize" term because it is "dependent" on that term and a "complement," rather than freestanding. As justification, petitioners claim that without the "authorize" term, Section 3702(2) becomes "a nonsensical federal prohibition that permits sports wagering when prohibited by state law but prohibits such wagering when it is permitted by state law." *Id.* But 3702(2) never "permits" sports wagering; it is simply inoperative as to sports wagering that is not done pursuant to a state law.

2. Petitioners' argument regarding Congress's intent is also inconsistent with PASPA's text. Petitioners' reading of PASPA is strange. They insist (at 40–45) that "authorize" must be read to include the rescinding of a prohibition. But under that approach, unless Congress's use of "sponsor," "operate," and "advertise" in Section 3702(1) were nullities, PASPA would be read to prohibit states from sponsoring, operating, and advertising gambling schemes that they already prohibit under their own laws.

A more plausible reading of the statute is that Congress viewed each of the prohibitions as freestanding: under PASPA, states would not be permitted to authorize sports gambling, nor would they be permitted to advertise or operate sports gambling schemes. Read this way, PASPA bans several rungs on the ladder of state involvement in sports gambling: from authorizing all the way up to operating.

Petitioners do not argue that their reading of the anti-commandeering doctrine applies to the steps on the ladder above "authorize" and "license," and nothing in the statute's text or structure suggests that Congress would want all of PASPA's remaining protections repealed. Petitioners' approach is contrary to this Court's practice of striving to give effect to every word Congress includes in a statute, and should therefore be rejected. *See, e.g.*, *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 70 (2011).

3. Finally, petitioners ignore that Congress specifically chose to restrict governmental entities rather than regulating only individuals and leaving states to their own devices. As discussed in detail above, Congress was concerned not with sports gambling in the abstract, but

with the specific phenomenon of "State-sponsored sports gambling." S. Rep. No. 102-248, at 4.

This concern had two distinct elements. One motivation behind the law, as Senator Bradley put it, was to prevent state-sponsored gambling from legitimizing sports betting by endowing it with "the imprimatur of the state."[61] This concern is not just reflected in the prohibition on state authorization of sports gambling. The specific prohibitions on governmental entities operating, sponsoring, advertising, or otherwise promoting sports gambling are all directly tied to the fear that putting the government's seal of approval on the activity communicates to society—and especially to children—that this activity is a normal and legitimate pastime.[62]

Congress was also concerned that state governments could not effectively regulate sports gambling. As we explained in Part I above, PASPA was passed in the midst of an aggressive wave of state gambling legalization. Congress passed the law in part because the "pressures in such places as New Jersey and Florida to institute casino-style sports gambling" illustrated how "[o[nce a State legalizes sports gambling, it will be extremely difficult for other States to resist the lure." S. Rep. No. 102-248, at 5. But this problem would not be confined to states that chose to give in to these incentives, because "[t]he harms [sports gambling] inflicts are felt beyond the borders of those States that sanction it." *Id.* PASPA was thus a response to "a national problem" that state governments would not be able to contain on their own. *Id.* Far from wanting states to be able to

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[61] Senator Bradley, Policy Concerns Behind PASPA at 5.

[62] *See id.* at 15 n.49 (quoting testimony that "[t]he rise of state lotteries clearly helped turn gambling from a vice to a normal form of entertainment.")

license and regulate sports gambling, Congress was specifically concerned that the lure of revenue from gambling licensing and regulation would lead States to make bad choices that would spill across the country.

Petitioners are thus wrong to declare (at 55) that there is "no evidence that Congress would have singled out State-run schemes *uniquely* for prohibition." Congress did exactly that in Section 3702, and the legislative history of PASPA demonstrates that Congress's plain language means what it says. "[N]othing in [PASPA's] text or historical context" indicates that Congress would have preferred no limitations on state governments whatsoever to limitations on state sponsorship, promotion, operation, and advertisement of sports gambling. *Cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010). Regardless of how this Court decides the question with respect to the "authorize" and "license" terms, then, the remaining prohibitions in Section 3702 should remain as freestanding restrictions on state-sponsored sports betting.

CONCLUSION

The Court should affirm the judgment below. In the alternative, if the Court accepts the petitioners' anti-commandeering argument, it should refrain from invalidating any provisions of PASPA beyond the "authorize" and "license" clauses of Section 3702(1).

Respectfully submitted,

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In the Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, 17 OTHER STATES, AND THE GOVERNORS OF KENTUCKY, MARYLAND, AND NORTH DAKOTA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Federal law does not directly prohibit sports wagering in States where the practice is legal. But the Professional and Amateur Sports Protection Act ("PASPA") prohibits a State, other than Nevada or several other exempted States, to "license" or "authorize" sports wagering. See 28 U.S.C. § 3702. The *en banc* Third Circuit, over two dissents, has interpreted this provision as prohibiting the States from modifying their laws to repeal existing prohibitions on sports wagering.

The question on which this Court granted certiorari is:

Whether a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York v. United States*, 505 U.S. 144 (1992)?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §§ 3701 *et seq.*, prohibits States from exercising core regulatory powers reserved to them and their citizens under the Tenth Amendment—namely, the power to "license" or "authorize by law" conduct that a State had previously chosen to prohibit. The Third Circuit, sitting *en banc*, has interpreted PASPA as prohibiting States from amending or repealing their own laws and requiring them to enforce laws that the citizens of those States or their elected representatives have voted to repeal. If this Court affirms that decision, Congress could compel the entire machinery of state government—legislatures, executives and courts—to maintain and enforce repealed state laws at the behest of the federal government.

The Constitution does not permit this result. To be sure, Congress undoubtedly has the power to preempt state law when it enacts a federal regulatory regime in furtherance of one of its enumerated powers. But PASPA far exceeds Congress's power to preempt state law—and conflicts with this Court's federalism jurisprudence—in two significant ways.

First, this Court's preemption cases all presuppose that the federal government has made an affirmative decision to regulate in a particular field and displace contrary state law. Congress, however, has not chosen to regulate sports betting. Instead, PASPA prevents state legislatures from making modifications to their *own* laws and then makes those

laws (and the apparatus of state government required to enforce them) instruments of federal policy. *Second*, PASPA (as interpreted by the *en banc* Third Circuit) cannot be reconciled with this Court's anti-commandeering jurisprudence because it requires state legislatures to maintain, and state executive officials to enforce, laws the citizenry would have repealed. PASPA thus offends the ultimate sovereignty of the People to determine whether, and in what circumstances, to delegate their powers and restrict their liberties through state law.

Amici curiae States submit this brief in support of Petitioners because PASPA impermissibly skews the federal-state balance. *Amici* States take no position on the wisdom of sports wagering, nor would all *amici* likely legalize sports betting even if permitted. But all *amici* do have a profound interest in the principle that—absent a validly enacted federal regulatory scheme—Congress cannot prevent the States from enacting, modifying, or repealing their own laws. If the Third Circuit's decision is upheld, Congress could prevent the States from repealing prohibitions—or altering existing regulations—in countless areas of traditional state concern, such as the sale or use of pharmaceuticals, medical devices, firearms, lottery tickets, or credit arrangements, to name a few.

Such proscriptions would insulate Congress from, and force the States to assume, the political accountability inherent in implementing federal policies. That result not only conflicts with this Court's jurisprudence, but also offends notions of residual state and individual sovereignty, both of

which are protected by the Tenth Amendment and have been recognized since before the Founding.

SUMMARY OF ARGUMENT

Our system of dual sovereignty limits the degree of control that Congress can exercise over state regulation. Indeed, the Constitution effectively provides Congress with two means to influence or displace state policy choices. First, Congress may "encourage a State to regulate in a particular way" by "hold[ing] out incentives to the States as a method of influencing a State's policy choices." *New York v. United States*, 505 U.S. 144, 166 (1992). Second, when Congress decides "to regulate matters directly" through an affirmative federal regime, the Supremacy Clause authorizes "pre-empt[ion] [of] contrary state regulation." *Id.* at 178.

With PASPA, Congress has selected neither option: It has not provided States with incentives to prohibit sports wagering nor has it enacted a federal sports betting regime to displace contrary state law. Instead, PASPA prohibits States from modifying their *own* laws to "authorize" or "license" sports wagering and, under the *en banc* Third Circuit's reading, compels States to enforce their own preexisting betting prohibitions, even if the people or their elected representatives have voted to repeal them.

That is impermissible. Congress cannot "regulate state governments' regulation." *New York*, 505 U.S. at 166. That is because "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress'

instructions." *Id.* at 162. But that is precisely what the court of appeals held that PASPA does: It requires state legislatures to maintain unpopular laws on the books, state executives to police those laws, and (presumably) state judges to enforce them. So interpreted, PASPA erodes our federal constitutional design in which both the national and state governments are presumed to have sovereignty to regulate in their respective spheres.

Two lines of this Court's federalism jurisprudence confirm that Congress, through PASPA, has exceeded its legitimate powers.

First, this Court's preemption cases make clear that Congress can displace state law if—and only if—it enacts an affirmative federal regime pursuant to one of its enumerated powers. This Court has never understood the Supremacy Clause to allow Congress to prohibit States from repealing their own laws in the absence of an affirmative federal regime that requires protection. While PASPA's prohibition on state authorizations of sports wagering may bear superficial similarity to an "express" preemption clause, every such clause that this Court has considered was enacted in support of a federal regulatory or deregulatory program. *See infra* pp. __. PASPA's naked attempt to regulate the machinery of state government without enacting a federal rule to displace contrary state laws is not a valid exercise in preemption.

Second, the *en banc* Third Circuit's reading of PASPA violates the Tenth Amendment's core anti-commandeering principles. It does so by prohibiting

States from repealing their own existing laws, which amounts to a blockade of the State's ability to return residual sovereignty to the people—or their delegates in the legislature—who first consented to the law. If permitted to stand, the Third Circuit's decision threatens the constitutional balance of power between States and the federal government. For this reason too, the Court should vacate the decision below and reinforce the appropriate line between permissible preemption and impermissible commandeering.

ARGUMENT

I. PASPA Exceeds Congress's Legitimate Powers And Usurps Powers Reserved To The States Under The Tenth Amendment

A. PASPA Is Not An Exercise In Legitimate Preemption Because Congress Has Not Enacted An Affirmative Regulatory Or Deregulatory Scheme

1. This Court has made plain that state-law preemption, under the Supremacy Clause, occurs only when the federal government acts to defend the integrity of its own efforts. This occurs in three instances. *First*, Congress might "enact[] a statute containing an express preemption provision." *Arizona v. United States*, 567 U.S. 387, 399 (2012). *Second*, "state laws are preempted when they conflict with federal law." *Id.* at 2501. Third, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Ibid.*

The common thread linking all three forms of preemption—express, conflict, and field—is the federal government's affirmative decision to govern the country directly. See, *e.g.*, *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981). With conflict or field preemption, the Court's analysis turns entirely on the affirmative federal law. Indeed, the inquiry in each case reduces to whether a federal law *implicitly* displaces a state law. Conflict preemption occurs when, after close scrutiny of the federal law, the Court concludes either that (1) compliance with the challenged state law has become "'a physical impossibility,'" *Arizona*, 567 U.S. at 399 (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)), or (2) the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *ibid.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Field preemption, in turn, occurs when federal law is "so comprehensive[] that it has left no room for supplementary state legislation." *R.J. Reynolds Tobacco Co. v. Durham Cnty., N.C.*, 479 U.S. 130, 140 (1986).

Although resolution of express-preemption cases tend to focus on a specific preemption clause—often a single statutory sentence—the express-preemption clauses at issue always exist as one part of an affirmative federal law.* This Court has recognized

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* See, *e.g.*, *Am. Trucking Ass'ns, Inc. v. City of Los Angeles, Ca.*, 133 S. Ct. 2096 (2013) (Federal Aviation Administration Authorization Act of 1994); *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (Federal Employees' Group Life Insurance Act of 1954); *Arizona*, 567 U.S. 387 (Immigration Reform and Control Act of

that express preemption clauses make explicit what is implicit in conflict or field preemption cases: some state laws cannot be reconciled with an affirmative federal scheme. See *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1977 (2011) (describing an "express preemption clause" as "the best evidence of Congress' preemptive intent" (internal quotations omitted)). In other words, the Supremacy Clause allows Congress to enact "a statute *containing* an express preemption provision" that makes clear which state laws must give way to the new federal regime without waiting for a court to make that determination. *Arizona*, 567 U.S. at 399 (emphasis added); see also *Easterwood*, 507 U.S. at 664 (noting that a federal statute may "contain[]" an express preemption clause); *Sprietsma*, 537 U.S. at 62 (same).

1986); *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012) (Federal Meat Inspection Act); *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, 555 U.S. 285 (2009) (Employee Retirement Income Security Act of 1974); *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431 (2005) (Federal Insecticide, Fungicide, and Rodenticide Act); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (Clean Air Act); *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004) (Telecommunications Act); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (Federal Boat Safety Act); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (Federal Cigarette Labeling and Advertising Act); *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000) (National Traffic and Motor Vehicle Safety Act); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (Medical Device Amendments to the Federal Food, Drug and Cosmetic Act); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (Airline Deregulation Act); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (Federal Railroad Safety Act); *Aloha Airlines, Inc. v. Dir. Of Taxation of Haw.*, 464 U.S. 7 (1983) (Airport and Airway Development Acceleration Act of 1970); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (Employee Retirement Income Security Act of 1974).

When added to an affirmative federal law, an express preemption clause protects the federal scheme from interference by inconsistent state laws.

Express preemption clauses exist to protect federal *deregulatory* regimes as well as regulatory regimes. In 1978, for instance, Congress enacted the Airline Deregulation Act ("ADA"), which marked a transition in that industry from complex government regulation to "maximum reliance on competitive market forces." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (internal quotations omitted). "To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law relating to rates, routes, or services of any air carrier." *Id.* at 378–79 (internal quotations omitted). Similarly, after Congress "deregulated trucking" in 1980, *Rowe v. N.H. Motor Transport Ass'n*, 552 U.S. 364, 368 (2008), it passed a law expressly "pre-empt[ing] state trucking regulation" in 1994 to ensure that the States would not "undo federal deregulation," *ibid.* (internal quotations omitted).

All of this Court's federal-preemption jurisprudence—whether concerning express, conflict, or field preemption—underscores that the Supremacy Clause establishes a rule of priority between federal and state law. The Constitution, of course, "establishes a system of dual sovereignty between the States and the Federal Government," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), and "[f]rom the existence of two sovereigns follows the possibility that [state and federal] laws can be in conflict or at cross-

purposes," *Arizona*, 567 U.S. at 398–99. For this reason, the Supremacy Clause "provides a clear rule that federal law 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.'" *Id.* at 399 (quoting U.S. Const. art. VI, cl. 2).

2. The *en banc* Third Circuit's analysis ignores the necessary predicate that Congress must make an affirmative decision to regulate (or deregulate) before federal law can be found to preempt state law. Instead, the Third Circuit concluded that "congressional action in passing laws in *otherwise pre-emptible fields* has withstood attack in cases where the states were not compelled to enact laws or implement federal statutes or regulatory programs themselves." JA 19a. The upshot of the Third Circuit's analysis is that Congress may preempt states from legislating in an area even if Congress *declines* to establish a federal regulatory regime, so long as the area is "otherwise pre-emptible." See *ibid.*

This analysis cannot withstand scrutiny. The very cases on which the Third Circuit relied—*Hodel* and *FERC v. Mississippi*, 456 U.S. 742 (1982)—demonstrate its error. In both *Hodel* and *FERC*, Congress explicitly chose *not* to exclude States from regulating in a particular area, but instead protected an affirmative federal scheme by conditioning the States' participation in the field. See *Printz v. United States*, 521 U.S. 898, 925–26 (1997) ("In *Hodel* we . . . concluded that the Surface Mining Control and Reclamation Act of 1977 did not present [a Tenth Amendment] problem . . . because it merely made

compliance with federal standards a precondition to continued state regulation. . . ."); *FERC*, 456 U.S. at 765 ("PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards."). By contrast, PASPA contains no federal standards for States to consider, but instead prohibits States from experimenting with their own regulatory schemes.

In short, this Court has never understood the Supremacy Clause to bestow upon Congress authority to bar States from acting in "otherwise pre-emptible fields" when no affirmative federal regime requires protection. See JA 19a. Instead of providing Congress with warrant to prohibit state legislation whenever and however it desires, this Court's cases make clear that the Supremacy Clause may only be used by Congress when state action risks stymying an affirmative federal regime. See *New York*, 505 U.S. at 178 ("The Constitution . . . gives Congress the authority to regulate matters *directly* and to pre-empt contrary state regulation.") (emphasis added).

For this reason, PASPA's attempt to prohibit States from repealing their own sports wagering laws—without enacting any affirmative federal regulation concerning sports wagering—is not a legitimate exercise of preemption under the Supremacy Clause.

B. PASPA Unlawfully Commandeers The States.

PASPA also violates the guarantees to the States and their citizens provided by the Tenth Amendment and this Court's anti-commandeering case law. Under the Tenth Amendment, Congress may not "regulate state governments' regulation." *New York*, 505 U.S. at 166. PASPA, however, as interpreted by the *en banc* Third Circuit, does precisely that by prohibiting States (with a few grandfathered exceptions) from repealing their own sports-wagering bans. This interpretation fundamentally misapprehends this Court's anti-commandeering jurisprudence.

The *en banc* Third Circuit upheld PASPA because, in its view, the statute does not "present[] states with a binary choice—either maintain a complete prohibition on sports wagering or wholly repeal state prohibitions." JA 17a–18a. It concluded that Congress still left "sufficient room under PASPA to craft their own policies." JA 23a. The court declined, however, to explain exactly which actions, short of a total repeal of all sports-wagering laws, PASPA would allow.

But the test for commandeering, as established by this Court, does not depend on whether federal legislation provides States with more latitude than a mere "binary choice," JA 17a. Instead, this Court's anti-commandeering doctrine operates to ensure that both the federal and state governments remain directly accountable for their respective actions. For that reason, the relevant inquiry is whether Congress has forced state governments to effectuate federal policy, thereby obscuring its own involvement. And this, of course, can occur even when Congress grants

states more than a "coercive binary choice." JA 23a. PASPA, for example, obscures lines of political accountability where, as here, it operates to require a State to enforce complete prohibitions on sports betting despite the fact that the State, acting through its citizens, has authorized a partial repeal.

1. PASPA Blurs Lines Of Political Accountability That Animate This Court's Anti-Commandeering Cases.

a. When drafting the Constitution, the Framers created a dual-sovereignty structure, which deliberately eschewed a regime in which Congress could "employ state governments as regulatory agencies." *New York*, 505 U.S. at 163. This decision was deliberate; indeed, that was the structure under the Articles of Confederation, and "[t]he inadequacy of th[at] governmental structure was responsible in part for the Constitutional Convention." *Ibid.* At the Convention, two proposals "took center stage," *id.* at 164, and the Framers "explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States," *id.* at 166.

The resulting dual-sovereignty structure drives the anti-commandeering doctrine's focus on ensuring that accountability is properly directed. The Framers determined that "[t]he new National Government 'must carry its agency to the persons of the citizens . . . [and] address itself immediately to the hopes and fears of individuals.'" *Id.* at 163 (quoting The Federalist No. 16, at 116 (Alexander Hamilton) (Clinton Rossiter ed., 2003)). Likewise, "a State's government [would] represent and remain

accountable to its own citizens." *Printz*, 521 U.S. at 920. The "great innovation of th[e] design" was "'a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Ibid.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

The anti-commandeering doctrine helps preserve our dual-sovereignty system. It does so by mandating that both state and federal governments receive the appropriate credit or blame for their respective actions, as well as the electoral benefits and burdens for their governance decisions. If the citizens of a State do not agree with a certain state policy, for example, "they may elect state officials who share their view." *New York*, 505 U.S. at 168. And if that view is contrary to the national view, it "can always be pre-empted under the Supremacy Clause," and then "federal officials [will] suffer the consequences if the decision turns out to be detrimental or unpopular." *Ibid.*

But when Congress forces States to implement federal policy, the state officials may "bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169. For this reason, this Court has emphasized that transparency and accountability animate the anti-commandeering doctrine. That the States may have to "absorb the [financial] costs of implementing a federal program" is not dispositive. *Printz*, 521 U.S.

at 930. Nor does the federal program's importance, *New York*, 505 U.S. at 178, or the State's consent, *id.* at 182, matter. The material inquiry is simply whether the federal government has positioned the State to assume any resulting "blame for [the federal program's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930.

Although accountability as a constitutional guidepost "may appear 'formalistic,'" the nature of our Constitution, which places great emphasis on "the form of our government," demands it. *New York*, 505 U.S. at 187. Dual sovereignty, and the accountability principles that flow from it, are as structurally important to our founding charter as the limits on congressional authority. Federalism, indeed, "is one of the Constitution's structural protections of liberty," *Printz*, 521 U.S. at 921, which delivers critical "'double security'" against tyranny and the abuse of power, *id.* at 922 (quoting The Federalist No. 51, p. 323 (James Madison)). By preserving this strict separation, "'[t]he different governments will control each other, at the same time that each will be controlled by itself.'" *Ibid.*

b. The *en banc* Third Circuit's defense of PASPA, and employment of a novel "coercive binary choice" test, fails to acknowledge that federal laws blocking States from considering all policy choices can also mask accountability, thus running afoul of the anti-commandeering doctrine. When a State denies a person a license or permit, the person has no reason to lay blame with Congress. Rather, barring unusual familiarity with the U.S. Code, he is more likely to blame the most obvious culprit: the state official whom he sought the license from directly.

History has recognized the human inclination to "shoot the messenger." Sophocles wrote in *Antigone* that "[n]o one likes the bringer of bad news." Sophocles, *Antigone* (c. 441 B.C.), *reprinted in* Sophocles: The Complete Plays 352 (Paul Roche transl., Signet Classics 2001). Shakespeare wrote in *Antony and Cleopatra* that "[t]he nature of bad news infects the teller." William Shakespeare, *Antony and Cleopatra* (c. 1606), *reprinted in* The Unabridged William Shakespeare 1135 (William George Clark & William Aldis Wright eds. 1989). English law historically punished as traitors those who would take out their frustration on the town criers who reported the King's news. See *Top town crier to be crowned as Hebden Bridge hits 500*, BBC, http://news.bbc.co.uk/local/bradford/hi/people_and_places/arts_and_culture/newsid_8931000/8931369.stm (last updated Aug. 20, 2010).

Critically, this Court has found irrelevant that a person may uncover federal government involvement with a little research. In *Printz*, for instance, this Court found that Congress had impermissibly shifted political accountability to state chief law enforcement officers ("CLEOs") when it forced them to conduct background checks during handgun sales, reasoning that the person wishing to buy a handgun will see "the CLEO and not some federal official" as the one "stand[ing] between [him] and immediate possession of his gun." 521 U.S. at 930. The Court recognized that "it will likely be the CLEO, not some federal official, who will be blamed for any error," even if the error was plainly caused by the "designated federal database." *Ibid.*

In short, if a federal law requires States to retain and enforce an unpopular state law to advance federal policy, the federal government has run afoul of this Court's anti-commandeering jurisprudence. This is true anytime the federal government clouds its own accountability; it simply does not matter if the federal government allows the States leeway beyond a binary, unpalatable choice. The Third Circuit's contrary conclusion is erroneous and, accordingly, it cannot stand.

2. Barring States From Repealing Their Own Laws Raises Particular Tenth Amendment Concerns.

The most pernicious aspect of the *en banc* Third Circuit's decision is that it interprets PASPA as forbidding the States from repealing their own laws. In 2013, the Third Circuit panel that first construed PASPA found that, at minimum, PASPA allowed States to "repeal[] [their] ban on sports wagering." JA 158a. Although this opinion was flawed for other reasons, See *infra* Part __, it at least recognized the commonsense notion that States have the prerogative to revisit their own legislation. On *en banc* review, however, the Third Circuit held that PASPA barred even the "selective repeal of certain [state-law] prohibitions." JA 23a. From a federalism perspective, this forced federal ossification of state law raises two additional (and fatal) concerns.

a. Any attempt by Congress to freeze in place existing state laws would violate the people's residual rights under the Tenth Amendment to recover their

powers and liberties by repealing prohibitions that no longer enjoy popularity.

This residual right of the people to change their own laws predates the Constitution and permeates the philosophy of natural rights that animated the American founding. In the 1600s, John Locke distinguished between the People's "Supream [sic] Power" and the legislature's derivative "Fiduciary Power." John Locke, Two Treatises of Government § 149 (P. Laslett ed. 1965). James Wilson, in turn, explained that Americans possessed the right to amend or alter the form of their constitution because "the supreme or sovereign power of the society resides in the citizens at large." James Wilson, *Lectures on Law Delivered in the College of Philadelphia, in* 1 The Works Of James Wilson 1, 14 (James DeWitt Andrews ed., 1896).

The principle that the people have the right to determine and alter the character of their government finds it most famous expression in the second paragraph of the Declaration of Independence, which proclaims that governments "deriv[e] their just Powers from the Consent of the Governed." The Declaration of Independence para. 2 (U.S. 1776). And this principle even transcended the Federalist/Anti-Federalist divide. James Madison repeatedly cited the people's "supreme" or "ultimate" authority in his contributions to the Federalist Papers and explained that all governmental power derived from and was responsible to its citizens. The Federalist No. 37, 39, 46 (James Madison), in The Federalist Papers 223, 239, 291 (Clinton Rossiter ed., 2003). The Anti-Federalist Federal Farmer agreed, writing that the

people, as the wielders of "the supreme power . . . reserve all powers not expressly delegated by them to those who govern." Letter from the Federal Farmer No. 16, in 2 The Complete Anti-Federalist 323 (Herbert J. Storing, ed., 1981).

To be sure, the framers of the Constitution recognized that the people could delegate their sovereignty to a properly-constituted government. But part of what made such delegation legitimate was the principle that bodies like state legislatures were ultimately responsible to and agents of the people, and that the people would have lawful mechanisms to change the terms of the delegation or reclaim power altogether. See James Wilson, *Lectures on Law Delivered in the College of Philadelphia*, in 1 THE WORKS OF JAMES WILSON 1, 14–15 (James DeWitt Andrews ed., 1896). For example, instructions provided to the drafters of North Carolina's constitution in 1776 make clear that "[t]he principal supreme power is possessed by the people at large, [and] the derived and inferior power by the[ir] servants," and "[w]hatever is constituted and ordained by the principal supreme power can not be . . . abrogated by any other power, *but the same power that ordained may . . . abrogate its own ordinances.*" Instructions to the Delegates From Mecklenburg, North Carolina, to the Provincial Congress at Halifax (1776), in 1 THE FOUNDERS' CONSTITUTION 56 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added). In other words, the people retained the power to abrogate or repeal ordinances enacted by their lawful representatives.

In the U.S. Constitution, the people expressly delegated to the federal government, subject to the constitutional amendment process, the right to enact laws in certain enumerated areas that would bind the entire nation and displace contrary state law. See U.S. Const. arts. I, § 8; V; VI, cl. 2. But the people did not delegate all of their sovereign power to the federal government. Rather, the Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X (emphasis added). This reservation of rights, and the division of authority between the state and federal governments, was ultimately intended to preserve the ultimately sovereignty of the people. See, *e.g.*, *New York*, 505 U.S. at 181 ("the Constitution divides authority between federal and state governments for the *protection of individuals*") (emphasis added); see also *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

While the Constitution is clearer on the allocation of regulatory authority between the federal government and the States, the Tenth Amendment is silent as to who should exercise all reserved power—the States or the people. See *Thornton*, 514 U.S. at 847 (Thomas, J., dissenting). Instead, the Constitution leaves "to the people of each State to determine which 'reserved' powers their state government may exercise." *Id.* at 848.

In other words, the Tenth Amendment protects—and the remainder of the Constitution does not disturb—the sovereign right of the people to

determine what reserved powers and liberties to retain for themselves and which to delegate or constrict. Put differently, the people of each State and their elected representatives—not Congress—get to decide whether to enact or repeal legislation in an area within the State's reserved powers (so long as the State's decision is not contrary to a valid, affirmative federal regulatory regime).

For this reason, this Court recognizes that federal laws should be narrowly construed "when Congress legislates in an area traditionally governed by the States' police powers." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188–89 (2014). This canon of construction protects the primacy of state power in areas the Constitution leaves to the States. See *Ah Sin v. Wittman*, 198 U.S. 500, 505–06 (1905).

Understanding the principles animating the Tenth Amendment lays bare the errors in the Third Circuit's decision. Properly understood, the Tenth Amendment enshrines the right of the People, through their elected state representatives, to recover their powers or liberties by repealing state laws. Allowing Congress to cement in place prohibitions within the State's reserved powers that citizens have voted to remove is simply anathema to the reasons why the Framers thought it necessary to include the Tenth Amendment in the Constitution.

This case provides a study as to how (absent PASPA) a State's citizenry can exercise its residual sovereignty under the Tenth Amendment to recover their liberties. There can be little doubt that regulation of sports wagering falls comfortably within

the reserved or "police powers" of the States. Indeed, because "[t]he suppression of gambling is concededly within the police powers of a state, . . . legislation prohibiting it, or acts which may tend to facilitate it, will not be interfered with by the court[s] unless such legislation [effects] a clear, unmistakable infringement of rights secured by the fundamental law." *Ah Sin*, 198 U.S. at 505–06 (internal quotation marks omitted).

Acting within this framework, the New Jersey Legislature, which had historically prohibited sports wagering, sought out ways in 2010 to financially bolster its struggling casinos and racetracks. JA 4a Public hearings ensued, which convinced state lawmakers that sports wagering might provide a necessary boost to New Jersey's gaming establishments. For that reason, the New Jersey Legislature provided its citizenry, via a 2011 constitutional referendum, the chance to decide whether the economic benefits of sports gaming outweighed the perceived drawbacks. *Ibid.* Sixty-four percent of those who voted decided that the benefits of sports gaming carried the day. *Ibid.*

Because there exists no contrary affirmative federal regime, New Jersey took action comfortably within the rights and powers reserved to it under the Tenth Amendment. The Third Circuit's construction of PASPA, which (as discussed above) is unmoored from the principles underlying federal preemption, denied New Jersey its right to do so And in so doing, the Third Circuit handcuffed New Jersey's citizenry by freezing in time prohibitions that no longer make sense to it.

While not all of *amici* States have actively considered or attempted to pass sports wagering laws, nothing in the Third Circuit's reasoning suggests that its approach would be limited in future cases. Instead, the Third Circuit's reasoning renders uncertain the extent to which *any* state electorate may control a State's broad police powers free from federal interference. If allowed to stand, the Third Circuit's reading of PASPA could place at the mercy of the federal government state attempts to experiment with their respective—and often uniquely local—approaches to, *inter alia*, hunting and fishing licenses, lotteries, concealed-carry permits, speed limits, food and drug regulations, and even the days on which alcohol might be sold. The slope is indeed slippery and, given the threat to liberty that drove the Framers to enact the Tenth Amendment, the Third Circuit's interpretation of PASPA cannot stand.

b. In addition, allowing the federal government to freeze unpopular state laws in place results in commandeering of state executive branch officials as well as state legislatures. The New Jersey Constitution, for example, affords the State's law enforcement officers with no discretion to nullify the gambling prohibitions that the State finds outdated. See, *e.g.*, N.J. Const. art. V, § 1, ¶ 11 ("The Governor shall take care that the laws be faithfully executed.").

Federal commandeering of state executive-branch officials violates the Constitution just as much as legislative commandeering. Indeed, "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of

the . . . States." *Printz*, 521 U.S. at 922. Above and beyond anti-commandeering concerns, this Court has recognized that state executive-branch commandeering also offends separation of powers principles. By allowing Congress to force *state* executive branch officials to enforce *state* prohibitions in furtherance of a *federal* legislative anti-sports-gaming objective, PASPA gives Congress license to "act as effectively without the President as with him," *id.* at 923, which "shatter[s]" federal "unity" and "reduc[es]" the power of the Presidency, *ibid.*

"The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict." *Id.* at 919 (citing The Federalist No. 15). Thus, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Id.* at 925 (emphasis added). Because the Third Circuit's reading of PASPA would require state executive officials to enforce unpopular laws that would otherwise be repealed, the court's analysis is fundamentally flawed.

3. The Earlier Third Circuit Panel's "Affirmative/Negative" Distinction Likewise Has No Basis In Tenth Amendment Principles.

It may be tempting for this Court to avoid the problems inherent in prohibiting States from selectively repealing their own laws by construing PASPA consistent with the initial 2013 Third Circuit

panel's distinction between "affirmative" acts like compelling a state to issue licenses (which the court deemed impermissible commandeering) and "negative" acts like prohibiting States from amending existing laws (which the court deemed permissible preemption). JA 157a–160a. But this would be a mistake. While the affirmative/negative command distinction may provide some more flexibility to States than the *en banc* Third Circuit's "coercive binary choice" test, it still has no basis in this Court's jurisprudence.

The affirmative/negative command distinction fails to recognize that federal laws prohibiting state action—particularly ones restricting or conditioning a State's ability to issue licenses—can result in precisely the sort of misplaced blame that the anti-commandeering doctrine aims to prevent. As noted above, when a State denies an individual his driver's license, building permit, medical license, or fishing license, the individual is unlikely to blame Congress, which did not enact some form of direct national regulation. Rather, the average American will blame the state officials who stand between the citizen and the desired license.

To be sure, *New York* and *Printz* did include some statements specifically barring Congress from compelling affirmative state action. See *New York*, 505 U.S. at 188 (finding it "clear" that Congress "may not compel the States to enact or administer a federal regulatory program"); *Printz*, 521 U.S. at 933 (same). But the reason for those seemingly narrow statements is that the offending federal law in both cases required affirmative state action. Those statements concerned

the particular statutes in the two cases and nothing more.

More important is the fact that the laws at issue in *New York* and *Printz*—as well as any number of other affirmative commands—could just as easily be written as prohibitions on state action. Instead of requiring States to enact certain regulations governing the disposal of radioactive waste, as was rejected in *New York*, Congress could put limitations on the ability of States to license the disposal of such waste. And instead of requiring state law enforcement officers to conduct background checks during handgun sales, as in *Printz*, Congress could prohibit those same state officers from issuing handgun permits if they have not performed a background check.

This Court thus could not have intended in those cases to limit the anti-commandeering doctrine to "affirmative" requirements, as that would have robbed those decisions of any real meaning. Congress could continue to govern in exactly the same objectionable way—making States implement a federal restriction on the activity in question rather than doing so itself—by slightly rewriting the offending laws. The Third Circuit has no answer to the general principle that many affirmative commands can be easily recast as prohibitions.

II. Laws Like PASPA Harm States, Their Citizens, And Our System Of Dual Sovereignty.

If this Court deems PASPA constitutional, it would greatly expand the federal government's power.

Armed with the ability to shift political accountability to the States, Congress could act without fear of voting booth repercussions, especially in controversial issues likely to spark the most vociferous political response. The threat to state sovereignty cannot be countenanced.

Under the Third Circuit's analysis, Congress could, for instance, bar American children from playing football, in response to burgeoning concerns regarding the sport's long-term effect on the brain. Rather than risk the political fallout likely to result from restrictions on a sport that embodies Americana, Congress could simply prohibit States from licensing youth football leagues. Similarly, federal legislators could restrict the States from issuing business licenses to Internet service providers unless those companies agreed to provide the FBI unrestrained access to their subscriber databases. In so doing, the resulting backlash due to new invasions of privacy would fall not on Congress but on the States. This is true even if a particular State would have decided to act otherwise.

The U.S. Constitution prohibits Congress from skirting its accountability in this fashion. In these examples (as in *Printz*), it will be the State, or a state official, and "not some federal official" who is interfering with day-to-day life, 521 U.S. at 930. And as in *Printz*, there would be legitimate concerns about misplaced blame despite the high-profile nature of these issues and the ease with which a person may discover the main driver of the relevant laws.

The genius inherent in our dual sovereign lies in the States' ability to act as a catalyst for change or a voice of dissent. Indeed, our system "promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). If Congress disagrees (and assuming it has the requisite Article I authority), it may establish a federal regime and preempt contrary state law. And when Congress does so, it is understood that the federal government has simply overridden the States and that individual States do not necessarily agree with the national policy.

Unless and until Congress does so, this Court's jurisprudence makes plain that the States have power to govern as they see fit. The Third Circuit's contrary view, which invites Congress to avoid taking ownership and allows it to force the States to advance preferred federal policy positions, cannot be reconciled with this Court's case law or the principles animating it. Because our federal system does not permit what the Third Circuit's analysis would allow, this Court cannot let that decision stand.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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